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TRANSCRIPT OF RECORD.

Jany. 8. 1894

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 175. 24

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE WATSON, ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIAM BANNING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 8, 1892.

(15,166.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 9, 1895.

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1 In the Superior Court of the County of Los Angeles, State of California.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ de Watson, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs,
vs.
WILLIAM BANNING, Defendant.
No. 13240.

The plaintiffs herein, complaining of William Banning, the above-named defendant, allege—

That on the first day of September, 1884, the said plaintiffs were the owners and seized in fee and possessed and entitled to the possession, as tenants in common, of all that certain lot of land situate in the county of Los Angeles, State of California, and described as follows, to wit: Being commonly called Mormon island, and is in sec. 8, T. 5 S., R. 13 W.: Beginning at the meander corner 1 at ordinary high-water mark, from which bears the northwest corner of section 7, township 5 south, range 13 west, of San Bernardino meridian and base line N. 65° 30′ W., 90.02 ch. distant, and running
2 along the shore of said island N. 9° E. 8.07 ch. to station 2; thence N. 1° E. 7.65 ch. to station 3; thence N. 11° W. 5.50 ch. to station 4; thence N. 19¾° W. 8.54 ch. to station 5; thence N. 1° W. 2.40 ch. to station 6; thence N. 7¼° E. 1.50 ch. to station 7; thence S. 58° E. 6.50 ch. to station 8; thence S. 16¼° E. 2.88 ch. to station 9; thence S. 60¾° E. 4.00 ch. to station 10; thence S. 22¾° E. 3.14 ch. to station 11; thence S. 30¼° W. 9.00 ch. to station 12; thence S. 7° E. 10 ch. to station 13; thence S. 49° W. 6.07 ch. to station 14; thence N. 65° W. 2.15 ch. to the place of beginning, containing 18.88 acres of land, and more particularly delineated on page 30 of Book of Township Plats S. W., vol. II, in the U. S. land office, at Los Angeles.

That while the plaintiffs were *as* such owners and so seized and possessed and entitled to the possession of said land and premises the said defendant did, on the day and year aforesaid, wrongfully and unlawfully and without right of title, enter into and upon the same and oust and eject the plaintiffs therefrom, and ever since that day wrongfully and unlawfully with-eld and still and now wrongfully and unlawfully does with-old the possession thereof from the plaintiffs, to their wrong, injury, and damage in the sum of ten thousand dollars.

That the value of the rents and profits of said lands and premises is one thousand dollars per annum, and that by reason of the unlawful with-olding of the said land by the defendant as aforesaid plaintiffs have been deprived and by the continuance thereof will be deprived of the use and occupation of the same, to their loss and damage in the sum of one thousand dollars.

3 Wherefore the said plaintiffs pray for judgment against the said defendant for the restitution of said land and premises,

and for the sum of one thousand dollars, damages for the withholding thereof, and one thousand dollars, damages caused by the loss of the value of the rents and profits thereof, together with costs of suit.

C. E. THOM,
Attorney for Plaintiffs.

Endorsed: "Filed May 17th, 1886."

(Title of Court and Cause.)

Answer and Cross-complaint.

Now comes the defendant, William Banning, and for answer to the complaint filed in the above action denies:

I.

That on the first day of Sept., 1884, or at any other time, the said plaintiffs or either of them were the owners and seized in fee and possessed of or entitled to the possession, as tenants in common or otherwise, of all or any part of that certain lot of land situate in the county of Los Angeles, State of California, described as follows, to wit:

Being commonly called Mormon island, and is in sec. 8, T. 5 S., R. 13 W.: Beginning at the meander corner 1 at ordinary high-water mark, from which bears the northwest corner of section 7, township 5 south, range 13 west, of San Bernardino meridian and base line N. 65° 30′ W., 90.02 ch. distant, and running along the shore of said island N. 9° E. 8.07 ch. to station 2, thence N. 1° E. 7.65 ch. to station 3, thence N. 11° W. 5.50 ch. to station 4, thence N. 19¾° W. 8.54 ch. to station 5, thence N. 1° W. 2.40 ch. to station 6, thence N. 7¼° E. 1.50 ch. to station 7, thence S. 58° E. 6.50 ch. to station 8, thence S. 16½° E. 2.88 ch. to station 9, thence S. 60¼° E. 4.00 ch. to station 10, thence S. 22½° E. 3.14 ch. to station 11, thence S. 30½° W. 9.00 ch. to station 12, thence S. 7° E. 10 ch. to station 13, thence S. 49° W. 6.07 ch. to station 14, thence N. 65° W. 2.15 ch. to the place of beginning, containing 18.88 acres of land, and more particularly delineated on page 30 of Book of Township Plats S. W., vol. II, in the U. S. land office at Los Angeles, being the same land described in the complaint, and denies that they have — interest therein whatever.

4

II.

Said defendant denies that he on the first of September, 1884, or at any other time, unlawfully or wrongfully or without right entered upon the land described or any part thereof, or ousted and ejected the plaintiffs or either of them from said land, but, on the contrary, alleges that he upon that date and for a long time prior thereto and ever since has been and now is in possession of said land, holding the same of right, he being the owner thereof in fee, and defendant here alleges that the plaintiffs have no interest or estate therein whatever.

III.

Said defendant denies that the value of the rents and profits of said land and premises is of the value of one thousand dollars per annum or any other amount whatever, and denies that he has deprived the plaintiffs or either of them of the possession of said land, *in* their damage in the sum of one thousand dollars or any sum whatever.

IV.

And for a further and separate answer and defense the
5 defendant alleges that he has been in the peaceable and quiet possession of the tract of land hereinbefore described, holding and claiming the same adversely to said plaintiffs and adversely to all other persons, for more that five years before the commencement of this action, and has at all times during said period paid all the taxes—State, county, or municipal—which have been levied or assessed upon said land, and that neither the plaintiffs nor any of them or either of their ancestors, predecessors, or grantors was or were seized or possessed of the said tract of land or any portion thereof within five years before the commencement of this action.

V.

And for a further and separate answer and defense defendant alleges that the cause of action set forth in the plaintiffs' complaint is barred by the provisions of section 318, 319 of the Code of Civil Procedure of the State of California.

Wherefore defendant prays judgment against the plaintiffs and for his costs of this action.

BICKNELL & WHITE,
Attorneys for Defendant.

And now comes the defendant and for cross-complaint against the plaintiffs in this action and as facts upon which he relies for affirmative relief in this action alleges:

I.

That he is now and for a long time hitherto has been in the actual possession of that certain piece or parcel of land situate, lying, and being in the county of Los Angeles, State of California, and bounded and described as follows, to wit:

6 Being commonly called Mormon island, and is in sec. 8, T. 5 S., R. 13 W.: Beginning at the meander corner 1 at ordinary high-water mark, from which bears the northwest corner of section 7, township 5 south, range 13 west, of San Bernardino meridian and base line N. 65° 30′ W., 90.02 ch. distant, and running along the shore of said island N. 9° E. 8.07 ch. to station 2, thence N. 1° E. 7.65 ch. to station 3, thence N. 11° W. 5.50 ch. to station 4, thence N. 19¾° W. 8.54 ch. to station 5, thence N. 1° W. 2.40 ch. to station 6, thence N. 7¼° E. 1.50 ch. to station 7, thence S. 58° E. 6.50 ch. to station 8, thence S. 16¼° E. 2.88 ch. to station 9, thence

S. 60¼° E. 4.00 ch. to station 10, thence S. 22¼° E. 3.14 ch. to station 11, thence S. 30¼° W. 9.00 ch. to station 12, thence S. 7° E. 10 ch. to station 13, thence S. 49° W. 6.07 ch. to station 14, thence N. 65° W. 2.15 ch. to the place of beginning, containing 18.88 acres of land, and more particularly delineated on page 30 of Book of Township Plats S. W., vol. II, in the U. S. land office at Los Angeles, being the same land described in the complaint filed in this action.

II.

That said defendant is the owner in fee of the said premises and that the said plaintiffs claim an estate or interest therein adverse to this defendant.

III.

That the claim of the said plaintiffs is without any right whatever and the plaintiffs have not nor have either of them any estate, right, title, or interest whatever in said land or premises or any part thereof.

7 And as another and separate cause of action in favor of this defendant and against said plaintiffs said defendant alleges:

I.

That he is now and was at the commencement of this suit and for more than five years before that time and from thence up to that time has been in the peaceable and quiet possession and occupation of all that certain tract or piece of land situate, lying, and being in the county of Angeles, State of California, being the same tract mentioned in the complaint and bounded and particularly described as follows, to wit:

Being commonly called Mormon island, and is in sec. 8, T. 5 S., R. 13 W.: Beginning at the meander corner 1 at ordinary high-water mark, from which bears the northwest corner of section 7, township 5 south, range 13 west, of San Bernardino meridian and base line N. 65° 30′ W., 90.02 ch. distant, and running along the shore of said island N. 9° E. 8.07 ch. to station 2; thence N. 1° E. 7.65 ch. to station 3; thence N. 11° W. 5.50 ch. to station 4; thence N. 19¾° W. 8.54 ch. to station 5; thence N. 1° W. 2.40 ch. to station 6; thence N. 7¼° E. 1.50 ch. to station 7; thence S. 58° E. 6.50 ch. to station 8; thence S. 16¼° E. 2.88 ch. to station 9; thence S. 60¼° E. 4.00 ch. to station 10; thence S. 22¼° E. 3.14 ch. to station 11; thence S. 30¼° W. 9.00 ch. to station 12; thence S. 7° E.10 ch. to station 13; thence S. 49° W. 6.07 ch. to station 14; thence N. 65° W. 2.15 ch. to the place of beginning, containing 18.88 acres of land, and more particularly delineated on page 30 of Book of Township Plat S. W., vol. II, in the U. S. land office at Los Angeles; and that he entered into possession of said tract
8 of land under a claim of title, founding such claim upon a written instrument as being a conveyance of the property above described, and that he has been in continuous occupation and possession of the property above described under such claim

more than five years before the commencement of this action, holding the same adversely to the plaintiffs and each of them and to all the world, and has paid all the taxes, State, county, or municipal, which have been levied on said land during said time.

Wherefore said defendant prays that the said plaintiffs and every one of them be adjudged to produce and bring forward any and all claims which they or either of them have or make upon the above-described tract of land or any part thereof, and that the same may, by the decree of this court, be declared invalid and of no effect, and that the said plaintiffs be properly restrained or enjoined from setting up or making any claim to or upon the said premises or any part thereof, and that all such claims be quieted, and that this defendant be declared and adjudged the owner and of right in the possession of said premises and every part thereof against any claim of said plaintiffs or any of them, and for such other relief as to this court shall seem meet and agreeable to equity, and for his costs of suit.

BICKNELL & WHITE,
Attorneys for Defendant.

Endorsed: Filed May 4, 1887. Chas. H. Dunsmoor, clerk, by F. B. Fanning, deputy.

(Title of Court and Cause.)

9 The above-entitled cause came on regularly for trial before the court, sitting without a jury, on the 29th day of February, 1888, the parties duly appearing. The action was tried before the court, a jury having been waived by the respective parties; whereupon the pleadings were read and the evidence of the respective parties introduced, and the cause submitted upon briefs in writing to the court for its decision; and now the court, having fully considered the same, makes, renders, and files this its decision in writing and finds the following facts:

I.

That neither the plaintiffs nor any of them were on the first day of September, A. D. 1884, or at any other time or are now seized in fee or possessed or entitled to the possession as tenants in common or otherwise or at all of all or any part of the land described in the complaint herein.

II.

That prior to the said first day of September, A. D. 1884, the defendant entered into and on that day was in the possession of said land and ever since has held and now holds the possession of said land, but the defendant did not on that day or at any other time oust or eject the plaintiffs or any of them therefrom, nor has he at any time wrongfully or unlawfully withheld from the plaintiffs or any of them the possession of any part thereof.

III.

That neither the plaintiffs nor any of them have by reason of any act of defendant suffered any wrong, injury, or damage in the sum of $10,000.00 or in any other sum.

IV.

That the value of the rents and profits of said land and
10 premises is the sum of $1,000.00 per annum, but neither the plaintiffs nor any of them have been deprived by reason of the defendant's holding such possession, nor by the circumstances thereof will any of the plaintiffs be deprived of the use or occupation of the same, to the loss or damage to them or any of them in the sum of $1,000.00 or any other sum.

V.

As hereinbefore found, the defendant, prior to the first day of September, A. D. 1884, entered into and ever since has been in the quiet and peaceable possession of the tract of land in the complaint described, holding and claiming the same adversely to the plaintiffs and adversely to all other persons, but he has not been in possession of the whole thereof for more than five years before the commencement of this action, nor has he at all times during said period of five years paid all the taxes, State, county, or municipal, which have been levied or assessed upon said land.

VI.

That neither the plaintiffs nor any of them nor their ancestors, predecessors, or grantors nor any of them were seized or possessed of all or any part of the said land within five years before the commencement of this action.

VII.

That plaintiffs' alleged cause of action is not barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

VIII.

That plaintiffs' alleged cause of action is not barred by the provisions of section 310 of the Code of Civil Procedure of the State of California.

11 IX.

That, as hereinbefore found, the defendant is now and for a long time hitherto has been in the actual possession of all that certain piece or parcel of land described in his cross-complaint herein, and the defendant is the owner in fee of the whole thereof.

X.

That the plaintiffs claim an estate or interest therein adverse to the defendant, but that the claim of the plaintiff- and each of them is without any right whatever, and neither of the said plaintiffs have any estate, right, title, or interest whatever in said land or in any part thereof.

And as conclusions of law the court is of the opinion:

First. That neither of the plaintiffs have any right, title, or interest in or to any portion of the land described in the complaint.

Second. That the defendant is the owner in fee of the whole of such land, the same being the land described also in his cross-complaint.

Third. That the claim of each of the plaintiffs to an interest therein is without any right whatever.

Fourth. That the defendant is entitled to judgement; that the plaintiffs take nothing herein, and that defendant recover of plaintiffs his, the defendant's, costs of this action.

Let the judgment be entered accordingly.

This done the 13th day of June, A. D. 1888.

A. W. HUTTON, *Judge.*

12 (Title of Court and Cause.)

Judgment.

The above-entitled cause came on regularly for trial before the court, sitting without a jury, on the 29th day of February, 1888, the parties duly appearing. The action was tried before the court, a jury having been waived by the respective parties; whereupon the pleadings were read and the evidence of the respective parties introduced and the cause submitted upon briefs in writing to the court for its decision, and the court, having made and filed its decision in writing and ordered judgment in favor of the defendant—

It is now by the court hereby ordered, adjudged, and decreed as follows:

I.

That the plaintiffs and each of them have and take nothing herein.

II.

That the defendant is the owner, seized in fee, and entitled to the possession of all that certain tract, piece, or parcel of land described in the complaint and also in the cross-complaint herein as being situate in the county of Los Angeles, State of California, and particularly described as follows, to wit:

Being commonly called Mormon island, and is in sec. 8, T. 5 S., R. 13 W.: Beginning at the meander corner 1 at ordinary high-water mark, from which bears the northwest corner of section 7, township 5 south, range 13 west, of San Bernardino meridian and

base line N. 65° 30′ W. 90.02 ch. distant, and running along the shore of said island N. 9° E. 8.07 ch. to station 2, thence N. 1° E. 7.65 ch. to station 3, thence N. 11° W. 5.50 ch. to station 4,
13 thence N. 19¾° W. 8.54 ch. to station 5, thence N. 1° W. 2.40 ch. to station 6, thence N. 7¼° E. 1.50 ch. to station 7, thence S. 58° E. 6.50 ch. to station 8, thence S. 16¼° E. 2.88 ch. to station 9, thence S. 60¼° E. 4.00 ch. to station 10, thence S. 22¼° E. 3.14 ch. to station 11, thence S. 30¼° W. 9.00 ch. to station 12, thence S. 7° E. 10 ch. to station 13, thence S. 49° W. 6.07 ch. to station 14, thence N. 65° W. 2.15 ch. to the place of beginning, containing 18.88 acres of land, and more particularly delineated on page 30 of Book of Township Plats S. W., vol. II, in the U. S. land office at Los Angeles.

III.

That the defendant have and recover of and from the plaintiffs his, the defendant's, costs of this action, taxed at $8—.

Done in open court this the 13th of June, A. D. 1888.

A. W. HUTTON, *Judge.*

Endorsed: Filed June 13, 1888. Chas. H. Dunsmoor, clerk, by A. N. Hamilton, deputy. Docketed April 9th, 1889. Entered and recorded April 9th, 1889, Book 10, page 184.

(Title of Court and Cause.)

Statement on Motion for a New Trial.

This cause came on to be tried before the court without a jury, by consent of the parties, and the following proceedings were had: The pleadings were first read; whereupon plaintiffs, in support of the issues on their part, offered in evidence a certified copy, from the office of the surveyor general of the United States for the
14 State of California, of the petition of claimants for the confirmation of the Rancho San Pedro, situated in the county of Los Angeles, State of California, to the board of commissioners created by act of Congress approved March 3rd, 1851, entitled "An act to ascertain and settle private land claims in the State of California," and also the decree of said board confirming same.

The same were admitted in evidence and read with the translations thereof, copies of the same being hereto attached and marked "Plaintiffs' Exhibit A."

Plaintiff- then offered the judgment of the district court of the United States for the southern district of California, in which district said rancho is situated, confirming the claim of the petitioners named in said petition to the tract of land known as the Rancho San Pedro, and, in connection with said judgment, a stipulation made between the district attorney of the United States for the southern district of California and the attorneys for said petitioners, dismissing the appeal in said cause to the Supreme Court of the United States and stipulating that the claimants might proceed

upon said decree of confirmation as on a final decree, and also the order made by said court in said cause dismissing the appeal therein to the Supreme Court of the United States.

All of said documents were admitted and read in evidence, copies of the said foregoing documents being hereto attached and marked respectively "Exhibit-'B,' 'C,' 'D,' and 'E.'"

Plaintiff- then offered the patent from the United States to the said petitioner and confirmees and copy of which is hereto attached and marked "Exhibit F."

15 It was here stipulated between counsel that whatever title vested by said confirmation and patent in said petitioners and confirmees had passed to and become vested in the plaintiffs in this action, who are now owners of whatever title passed under said confirmation and patent to the said petitioners and confirmees.

GEORGE HANSEN, for plaintiff-, was sworn and testified:

I am a land surveyor; have been engaged in that occupation in the county of Los Angeles since 1853, all the time, more or less. I know the Rancho San Pedro, in the county of Los Angeles. The patent for said Rancho San Pedro, in evidence herein, was here handed to witness, and he was asked if he was familiar with the descriptive calls contained in that patent, and he said that he was; that he had examined said patent; that he was acquainted with the map attached thereto and with the descriptive calls therein and to the objects shown upon it.

The attention of the witness was here called to that portion of said patent map shaded in blue marked "Inner bay of San Pedro."

Counsel for plaintiff- here read to the witness the descriptive clause contained in the decree of confirmation of said rancho in evidence, as follows: Commencing at the large sycamore tree (aliso) standing on the side of the highroad leading from San Pedro to Los Angeles, thence running in a westerly direction to a stone placed near the highroad above mentioned and near a small arroyo or creek; thence crossing the plain and following the line of said stones, which are placed as landmarks along said boundary line, to a large stone placed as a monument in said line on the top

16 of a sand hill; thence to the sea, passing by and including the salt ponds known by the name of Las Galinas; thence along the sea until it reaches a point opposite the northern line of the Rancho Palos Verdes, occupied by and confirmed by said commissioner, to the Sepulvedas; thence following said line in an easterly direction to some sand hills for about twelve thousand varas; thence southerly to a point called La Goleta, on the seacoast; thence following the seacoast easterly to the River San Gabriel: thence up said river to a point where a line drawn from the stone first mentioned through said sycamore tree would strike said river; thence along such line to the place of beginning, containing about eight and a half square leagues, a little more or less. All of several points referred to in said description were pointed out on said map

and their location thereon indicated by him in the exterior lines of the tract shown on said patent map.

The witness then stated that he had traced on the grounds said descriptive calls contained in said decree just read to him, and that he had also traced upon the ground the lines described in said patent and delineated upon said patent map; that the descriptive calls contained in said decree of confirmation and in said patent and shown upon said patent map were the same; that the only difference between them was that the patent description was all courses and distances, while the description of the decree was by landmarks.

That the lines of the decree and exterior lines of the patent and the patent map were identical; that the survey was made in conformity to the decree of confirmation, and from that survey the description contained in the patent was made.

17 The attention of the witness is here called to that portion of the map marked "Inner bay of San Pedro," and he is asked if he has examined the descriptive calls contained in that portion of the patent.

The witness answered that he had made such examination, *an* and that they corresponded with the description as shown upon the patent map.

Witness further stated that what is marked upon said patent map within the lines shaded blue is described in the text of the patent as Inner bay by courses and distances, and that all that portion was designated as Inner bay and was described in the patent as within the exterior boundaries called for in said decree of confirmation, entirely within the descriptive calls thereof, and within the exterior boundary lines described in the patent and shown on the map accompanying the same.

The witness further stated: I am acquainted with that place within the Inner bay of San Pedro known by the general name of "Mormon island;" it is within the exterior boundaries of the decree of confirmation and within the exterior boundaries described in said patent; they are necessarily the same, as they are identical.

It was here agreed between counsel that the premises described is a parcel of land situated in said Inner bay, known as "Mormon island."

Witness stated Mormon island is above water; it is not submerged.

Cross-examined:

Witness is asked by counsel for defendant, "Is this tract known as Mormon island within what is marked on the map as 'Inner bay of San Pedro' excepted or not?"

To which he answered:

18 Mormon island is situated within the limits of what is called upon the map "Inner bay;" and further stated that he had examined the lines of what is called in the patent the "exception," and that Mormon island is within the lines of such exception so described, and that it is also within the lines called for in the patent as "Inner bay."

It was here admitted by counsel for plaintiff that Mormon island is within what is designated as the Inner bay of San Pedro in the patent. Witness states that in the patent the exception is made by saying that the navigable waters of the Inner bay are excepted, and he said: It then goes on and is described by metes and bounds—the Inner bay. Now, this Mormon island is situated within the Inner bay. I cannot say whether the Inner bay is excepted; this being land, I suppose it is not excepted.

In answer to a question by counsel for defendant the witness says: As I have repeatedly stated, Mormon island is within the Inner bay—within the descriptive calls of the Inner bay.

GEORGE CARSON, a witness for plaintiff, testified:

I reside on the Rancho San Pedro, in the county of Los Angeles, the same rancho that has been referred to by the last witness, Mr. Hansen. I know the premises in controversy in this action, known by the name of Mormon island; I know by report that defendant Banning was in the occupation of the land at the time this action was commenced.

It was admitted by counsel that defendant was in possession at and before the commencement of this action.

(Plaintiff here rested.)

19 Defendant then read in evidence a patent from the United States to William Banning, a copy of which is hereto attached and marked "Exhibit G."

It was admitted by counsel that the patent includes Mormon island.

WILLIAM BANNING, for defendant, testified:

I am the William Banning named in the patent just introduced in evidence. I think that it was in April, 1880, that I entered into possession of that island. I have been in possession of it to the present time, using it as a ship yard. My possession has been exclusive. No claim of any one else has been made to the possession, except this claim of the plaintiffs, which I first knew of a year ago, about the time this suit was brought. This tract of land known as Mormon island is an island; at about half tide it is an island, and is now an island at low water; at low water it is only partly surrounded by water; at low water it would not be surrounded with water; at mean tide there would be about two feet of water around it; at high tide it is almost all covered with water.

Cross-examined:

My possession began by my buying out the party who was then on it. I paid him to get off and then I went on. At the time that I went on I claimed that the title to it was in the Government of the United States, and I continued to claim that it was public land of the United States until I obtained the patent for it from the United States and then I claimed to own it from that time on. A very small portion of the island is above ordinary high water. At

mean tide, at mean high tide, I don't think there is an acre
20 above water. The descriptive clause in the patent to me extends to mean low water. I think to include eighteen acres would carry it to mean low water. We occupied a portion of it that was covered with water. I have shipways there and houses on piles. About an acre is covered in that way. Another portion of the island we run lighters on and pile lumber on when the high tide falls. We use in that way sometimes a couple of acres on the west side, the channel side of the island, and that kind of occupation would cover about three acres.

J. A. BENNETT, for defendant, testified:

I reside in Los Angeles; am a searcher of records for the Abstract and Insurance Company, of that city. I have made a search of the records of the assessment of lot 1, section 8, township 5 south, range 13 west, commencing with the fiscal year 1880 and 1881, and I found that in the years 1880 and 1881 and 1882 that there is assessed to Manuel Dominguez fractional section 8, township 5 south, range 13 west, 204 acres. The taxes were paid. In 1883 the same land was assessed to the estate of Manuel Dominguez, F. Mora, administrator, and the assessment paid.

In 1884 I found it assessed to Maria E. C. Dominguez by George Carson, administrator, and the taxes paid.

In 1885 it was assessed in the same way and taxes paid. All of those assessments included 204 acres, being fractional section 8, township 5 south, range 13 west, for all these six years.

In 1886 and also 1887 I found William Banning assessed for
21 18.88 acres of section 1, township 5 south, range 13 west, taxes paid. That is all that appears on the assessment books that I could ascertain relative to this matter.

In the assessment of 1880 and 1881 there is no reference to a map.

In 1882 and 1883 there is a reference to a map. I cannot state definitely what the reference is. I think it alludes to a map on file in the recorder's office, as they usually do. We never take those down.

A. G. MAPPA, a witness for the defendant, testified:

I am deputy county recorder of the county of Los Angeles. I have here a map which I was requested to bring here by counsel for defendant. It is part of the records of Los Angeles county. Said map was marked "Map of land of Manuel Dominguez, filed June 5th, 1880, at four o'clock and 40 minutes p. m., at request of Manuel Dominguez. Charles Lamb, county recorder, by C. H. Dunsmoor, deputy."

The said map of the land of Manuel Dominguez in the Rancho San Pedro, county of Los Angeles, State of California, 23,785.58 acres, drawn by A. Solano, surveyor, May 12th, 1880.

The witness continued and stated that in 1880 the law required the subdivision of large tracts of land for assessment. These were the only maps that were filed at that time.

Counsel for defendant stated that he offered the map referred to by witness in evidence for the following purposes: First, to show that at the time the owners of the ranch filed this map in pursuance of the statute they left out of the map the part excepted in the patent and included in the map filed as their land only that which was outside of the part excepted in the patent and inside the exterior boundaries of the rancho; and for the further purpose to
22 show that the assessment made and paid by Dominguez on the two hundred and four acre tract, which is in the fractional section 8, does not include Mormon island, the land in controversy, and to show that the owners of the land returned that said fractional section 8 as a part of what is known as Rattlesnake island, and also for the purpose of showing that Mormon island has not been assessed to anybody during the years referred to by the witnesses; a copy of which said map is hereto attached and marked "Exhibit —."

Objections having been made by counsel for plaintiffs that the map was immaterial, irrelevant, and incompetent for the purpose for which it is offered.

The COURT: I think you had better wait before I rule on the objections. If the assessment refers to it, that would certainly strengthen the offer.

C. A. BENNETT was here recalled for defendant and he testified—

That he had made a further examination of the record relative to the assessment before spoken of by him; that he desires to correct his former testimony with regard to 1880 by saying, "I found that there is reference to the map the same as the other years, but the reference is not in the usual place."

Witness is asked by counsel for defendant, "Have you before you or have you made a copy of any part of the assessment of fractional section 8, township and range spoken of?"

The witness answered, "I have. I have the copy in my hand. It is a part only."

In 1881 it is the part following the assessment. In 1882 and 1883 it is the part preceding it—the head of the assessment.

23 Objection was made by counsel for plaintiff that a part only of the record was inadmissible and incompetent.

The objection was sustained by the court that if the defendant desires to show what is on the assessment-roll he should produce either a certified copy or the books complete.

A. MONTANO, a witness for defendant, testified—

That he is county auditor of the county of Los Angeles, and has official control of the assessment books of said county.

Witness produced a book and stated that it is the assessment-roll of the different years from 1880 to 1885, inclusive.

Counsel for defendant offers in evidence entries appearing on page 237 of the Assessment Book of 1881, volume 2, so far as the same relates to fractional section 8, township 5 south, range 13 west,

204 acres, valued at $102.00, and also entries appearing upon said book showing that it was assessed to Manuel Dominguez, Wilmington; also "all the above property situate in Los Angeles county, filed June 5th, 1880," that being the assessment for 1881.

Witness also produced another book for the year 1882, from which counsel offered in evidence the entries on said book, number 2, volume 1, so far as the same relates to the assessment of fractional section 8, township 5 south, range 13 west, 204 acres, assessed at one hundred and two dollars, with a further entry appearing at the head of the list, "Manuel Dominguez, Wilmington, all of the following-described property, as per map of the Rancho San Pedro, now on file in the office of the county recorder of Los Angeles county, filed June 5th, 1880," upon which taxes is thereon
24 marked paid, and a further entry which appears at the foot of the last-described entry.

All above-described property situate in the county of Los Angeles, as per map of the Rancho San Pedro, now on file in the office of the county recorder, filed June 5th, 1880; also the entries upon page 73 of the Assessment Book for the year 1883, marked volume 2, in so far as the same relates to fractional section 8, township 5 south, range 13 west, and containing 204 acres, assessed at $113.00, assessed to the estate of Manuel Dominguez, T. Mora, administrator, with the entry at the head of the list, "all of the following-described property, as per map of the Rancho San Pedro, now on file in the office of the county recorder of the county of Los Angeles, filed June 5th, 1880;" also certain entries appearing upon page 233 of the Assessment Book 84, volume 3, in so far as the same relates to fractional section 8, township 5 south, range 13 west, containing 204 acres, assessed at $150.00; at the end of which entries appears the words, "all the following described property, as per map of the Rancho San Pedro, now on file in the office of the county recorder of Los Angeles county, filed June 5th, 1880," assessed to Maria E. C. Dominguez, G. Carson, administrator, and also the entries appearing upon page 222 of the Assessment Book, page 55, volume 3, in so far as the same relates to fractional section 8, township 5 south, range 13 west, 204 acres, assessed at $150.00 to Maria E. C. Dominguez, George Carson, administrator, the head being in Los Angeles county, San Pedro rancho, as follows, to wit:

The map referred to in the previous assessment in evidence being referred to in said assessment of 1885; whereupon the court
25 overruled the exception of the counsel for plaintiff- last mentioned, and said entries in said book were admitted and read in evidence.

Counsel for plaintiff- excepting to the ruling of the court.

It was here agreed by counsel that from the year 1880 to 1885, inclusive, said tract of land was assessed to Manuel Dominguez, Maria E. C. Dominguez, and the estate of Manuel Dominguez.

That in 1886-'7 it was assessed to defendant, who paid taxes on it for that year—that is, upon 18.88 acres, comprising one lot in section 8.

C. A. BENNETT was recalled for defendant and testified:

I didn't find the land in controversy assessed during the years mentioned, from 1880 to 1886 and 1887, inclusive, to any other persons named on said assessment-list.

The defendant was recalled and testified—

That he paid the taxes assessed against the land in controversy for the years 1886 and 1887.

By consent witness was further examined by counsel for plaintiff-, and he testified that he did not think that there was as much as one acre of Mormon island uncovered by water at high tide.

Specifications of the Insufficiency of the Evidence to Justify the Findings.

I.

Finding I is not justified by the evidence in that it appears
26 from the evidence that the plaintiffs were on the first day of September, 1884, and ever since have been seized in fee as tenants in common and entitled to the possession of the premises described in the complaint.

II.

Finding II is not justified by the evidence, as it appears therefrom that the defendant did eject and oust said plaintiff- from the possession of the premises described in the complaint on the first day of September, 1884, and ever since has wrongfully and unlawfully withheld the possession thereof from the plaintiffs.

III.

Findings III and IV are not justified by the evidence, as it appears from the evidence in the cause that plaintiffs have been damaged in the amount of the value of the rents and profits of the demanded premises since the first day of September, 1884, to wit, in the sum of $1,000.00 per annum from said last-mentioned date, by acts of the defendant and by his depriving them of the possession of said premises ever since said date aforesaid.

IV.

Finding V is not justified by the evidence, there being no evidence whatever of any adverse holding or claim of said defendant adversely to said plaintiffs or to any person whomsoever at any time.

V.

Finding VI is not justified by the evidence in this cause, it appearing that said plaintiffs, their ancestors, predecessors, and grantors, had been for more than twenty-five years before this action was commenced seized and possessed of all said demanded premises.

27 VI.

Finding IX is not justified by the evidence, it appearing from the testimony in the cause that the plaintiffs are the owners of the parcel of land described in the cross-complaint of defendant, and that defendant has no estate or interest therein.

VII.

Finding IX is not justified by the evidence, it appearing from the testimony that the plaintiffs are the owners of the premises in question and entitled to the possession thereof.

Errors of Law.

That the court erred in holding that the plaintiffs had no right, title, or interest in the premises in question.

In holding that the defendant is the owner in fee of said land in controversy.

In holding that the claim of plaintiffs and each of them to said premises is without any right whatever; and

In holding that the defendant is entitled to judgment, and that plaintiffs take nothing herein.

Upon the foregoing statement and for the insufficiency of the evidence and errors of law above specified and assigned the plaintiffs ask that a new trial of said cause be granted upon the grounds stated in their notice of motion for a new trial served and filed in said cause.

HOUGHTON, SILENT & CAMPBELL,
Attorneys for Plaintiffs.

I hereby certify that the plaintiff- in said cause in due time served and filed a notice of *his* intention to move for a new trial thereof upon the following grounds:

28 1. Insufficiency of the evidence to justify the decision.

2. That the decision is against law.

3. Errors in law occurring at the trial and excepted to by plaintiff-.

And at the same time gave notice that said motion would be made on a statement of the case and a bill of exceptions.

That said plaintiff- within the time allowed by law and the stipulation of the parties therefor served *his* statement and bill of exceptions, to which amendments were made by defendant.

That the foregoing is the engrossed and settled statement and bill of exceptions on plaintiffs' motion for a new trial of said cause as the same has been allowed and settled by me, the judge of the court before whom said cause was tried, and the same is correct.

Dated January 4th, 1889.

A. W. HUTTON, *Judge.*

PLAINTIFFS' "EXHIBIT A."

The honorable board of commissioners for ascertaining and settling private land claims in the State of California:

The petition of Manuel Dominguez, Conception Roche, Bernardo Roche, Jose Antonio Aguitre, Maria Jesus Cota de Dominguez, Madelena Dominguez, Anders Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, and Jose Dominguez, all of Los Angeles county, respectfully show to your honorable board that they claim in fee-simple a certain tract of land situate in the county of Los Angeles, known by the name of San Pedro, containing ten square leagues, more or less.

29 They further show that they claim said tract of land, a portion of them by inheritance from and a portion by purchase from the heirs of Christopbal Dominguez, who died seized in fee thereof and who inherited from his uncle, Juan Jose Dominguez, who died, also seized thereof in fee, somewhere about the year 1809–'10.

They further show to your hon. board that Juan Jose Dominguez previous to his death obtained a perfect grant or concession of the said tract, but at what particular date or from what precise governor cannot now be discovered, owing to the fact that during his lifetime the papers issued and granted, it is believed, by Jose Dario Arguello, governor of the peninsular, in pursuance of the power duly vested in him, were burnt or lost; which said papers, it is averred, contained a complete or perfect grant to the said Juan Jose.

Your claimants further show to your honorable board that said title has been frequently and repeatedly acknowledged by both the Spanish and Mexican governments, and particularly Don Pablo Vincente de Sola, governor of the province of California, by a decree bearing date 31st December, 1822. A traced copy thereof from the archives in the custody of the U. S. surveyor general is herewith annexed and marked "A," as well as a translation of the same, marked "B," said decree being made in pursuance to authority vested in Governor Sola, and was made in the most solemn and authoritative form upon the petition of the aforesaid Christobal Dominguez.

Your petitioners further show that the said Christobal Dominguez, the father and grandfather of the majority of your petitioners, possessed the said tract of land peaceably and quietly up to the period of his death, and died in the full and legal seizure thereof

30 about the year 1823, and that since that time his heirs and representatives have held and now hold the full, recognized, and peaceable possession thereof except as in hereafter stated, which said possession was known to the Mexican government and approved, ratified, and confirmed by it in numberless instances.

Your petitioners further show to your honorable board that the lines and boundaries of said tract are and have been always well known and defined and respected; that somewhere about the year 1817 the judicial possession of said tract was given by competent

authority, and its lines and boundaries marked out and clearly designated as follows: Commencing at a large alder tree which now forms a part of the boundary line of the petitioners and Antonio Maria Lugo, thence east to the River San Gabriel; thence down said river to the coast; thence along the said coast to a point opposite the salt pits (la salina); thence following certain piles of stones placed as boundary marks (mojoneras) to the point of commencement, all of which said tract has been and now is possessed as aforesaid by your petitioners and those under whom they claim, except a certain portion known by the name of the Sierra de San Pedro and a thousand varas to the north thereof, which was ceded and abandoned in favor of the heirs of Dolores Sepulveda by Manuel Dominguez, executor of the last will of the said Christobal Dominguez, in a judicial compromise made and entered into before Governor Figueroa in the year 1834 between the said Manuel Dominguez and one Manuel Guitierrez.

Your petitioners further show that at his death, in November, 1823, Christobal Dominguez left six children, to whom he beque-thed
31 the Rancho of San Pedro, to wit, Manuel, Nazario, Victoria, Marcelina, Helena, and Pedro; that Marcelina died intestate and without children, whereby the remaining heirs inherited her right; that said Manuel purchased the right of the said Nazario in 1835 and of Victoria in 1852; that Helena intermarried with one Roche and died, leaving three children, to wit, Manuel Roche, whose right to the said rancho was purchased by the said Manuel Dominguez, and Conception Roche and Bernadino Roche; that Pedro sold one-half of his right to Jose Antonio Aguirre and the other half to his wife, Maria Jesus Cota de Dominguez, and his children, Magdalena, Andres Estabana, Pedro Maria, and Jose, in the year 1850, and your petitioners therefore aver they claim in fee the said Rancho of San Pedro as tenants in common in the shares and proportions as aforesaid in virtue of the aforesaid grants, of their long, pacific possession, and of the ratification, approval, and acknowledgment of their title by the Mexican government.

Your petitioners further show that they know of no conflicting claim to said Rancho of San Pedro, either in virtue of title or bare possession.

They rely upon the document marked "A" and upon such further documentary and verbal testimony as they may be advised may be necessary.

Therefore they pray the honorable board to take their said claim into consideration, and to declare their title to the said Rancho of San Pedro good and valid and to confirm the same; and, as in duty bound, etc., etc.

By their attorney, J. LANCASTER BRENT.

Endorsed: No. 398. Manuel Dominguez *et als.* San Pedro. Petition. Filed in office Oct. 19th, 1852. Geo. Fisher, secretary.

32 Recorded in Record of Petitions, vol. 1, pages 325, 326, & 327.

GEO. FISHER, *Secretary.*

OFFICE OF THE SURVEYOR GENERAL OF THE
UNITED STATES FOR CALIFORNIA.

I, R. P. Hammond, Jr., surveyor general of the United States for the State of California and, as such, having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, as also the papers of the late board of commissioners to ascertain and settle the private land claims in California, by virtue of the power vested in me by law, do hereby certify that the 5 preceding and hereunto annexed pages of paper, numbered from one to five, inclusive, exhibit a true, full, and correct copy of the original petition filed in case "No. 398, Manuel Dominguez *et al.*, San Pedro," as the same is designated on the docket of the aforesaid board of commissioners, together with endorsement thereon, and now on file in this office and in my custody; that I have carefully compared the same with the original, and that the same is a correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto signed my name
[SEAL.] officially and caused my seal of office to be affixed, at the city of San Francisco, this first day of November, 1887.

R. P. HAMMOND, JR.,
U. S. Surveyor General for California.

33 PLAINTIFFS' "EXHIBIT B."

In the District Court of the United States for the Southern District of California.

MANUEL DOMINGUEZ *et al.*, Appellees, *ads.* THE UNITED STATES, Appellants. } Case No. 273. "San Pedro." Transcript 398.

This cause coming on to be heard on appeal from the decision of the United States board of land commissioners to ascertain and settle private land claims in the State of California under an act of Congress approved March 3rd, 1851, upon a transcript of the proceedings and decisions of this board and of the papers and evidence upon which the said evidence was founded and upon additional evidence filed before this court, and it appearing that said transcript and notice of appeal have been duly filed according to law and counsel for the respective parties having been heard—

It is ordered, adjudged, and decreed that the decision of the said board of land commissioners be, and the same hereby is, affirmed.

And it is further adjudged and decreed that the claim of the appellees to the lands claimed in this case is good and valid and the same are hereby confirmed to them as follows:

The lands of which confirmation is hereby made are those known as the "Rancho of San Pedro," situate in Los Angeles county and bounded as follows:

Commencing at the large sycamore tree (aliso) standing on
34 the side of the highroad leading from San Pedro to Los Angeles, thence running in a westerly direction to a stone placed near the highroad above mentioned and near a small arroyo or creek; thence crossing the plain and following the line of said stones, which are placed as landmarks along said boundary line, to a large stone placed as a monument in said line on the top of a sand hill; thence to the sea, passing by and including the salt ponds known by the name of Las Salinas; thence along the sea until it reaches a point opposite the northern line of the Rancho Palos Verdes, occupied by and confirmed by said commissioner to the Sepulvedas; thence following said line in an easterly direction to some sand hills for about twelve thousand varas; thence southerly to a point called La Goleta, on the seacoast; thence following the seacoast easterly to the River San Gabriel; thence up said river to a point where a line drawn from the stone first mentioned through said sycamore tree would strike said river; thence along such line to the place of beginning, containing eight and a half (8½) square leagues, a little more or less.

Thus done and signed in open court this 10th day of February, 1857.

ISAAC S. K. OGIER,
U. S. Dist. Judge for the S. Dist. of Cal.

Endorsed: Filed this 10th day of February, 1857. C. Sims, clerk, by I. H. Coleman, dep.

35 PLAINTIFFS' "EXHIBIT C."

In the District Court of the United States for the Southern District of California.

MANUEL DOMINGUEZ *et al.*, Appellees, *ads.* THE UNITED STATES, Appellants. } Case No. 273. "San Pedro." Transcript 398.

In pursuance of a certain notice from the Attorney General of the United States, hereto annexed, that the appeal in the above case to the Supreme Court will not be prosecuted by the United States—

It is stipulated and agreed between the parties that an order of court may be entered vacating the former order granting said appeal and giving the claimants leave to proceed under the decree of confirmation of this court as under a final decree.

P. ORD, *U. S. Dist. Att'y.*
J. LANCASTER BRENT,
Att'y for Appellees.

Endorsed: Filed June 4, 1857. A. S. Taylor, dpt. cl'k.

PLAINTIFF'S "EXHIBIT D."

Order Vacating Order of Appeal.

In the District Court of the United States for the Southern District of California.

MANUEL DOMINGUEZ *et al.*, Appellees, *ads.* THE UNITED STATES, Appellants. } Case No. 273. "San Pedro." Transcript 398.

36 Notice having been given by the Attorney General of the United States that the appeal in this cause to the Supreme Court will not be prosecuted by the United States, and a stipulation having been entered into by the United States district attorney and the attorney of claimants that the former order of this court granting as appeal herein to the Supreme Court may be vacated, and that the decree of this court heretofore entered in this cause may by order of this court be made final:

It is ordered that the order of this court, made on the 24th day of February, 1857, granting an appeal to the Supreme Court from the decree of confirmation of this court, filed on the 10th day of February, 1857, be, and is hereby, vacated, and that the claimants have leave to proceed under said decree as under a final decree.

This done and signed in open court this 4th day of June, 1857.

[SEAL.] ISAAC S. K. OGIER,
U. S. Dist. Judge.

Endorsed: Filed June 4, 1857. A. S. Taylor, dep. cl'k.

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing to be full, true, and correct copies of the decree, stipulation, and order vacating order of appeal in the cause entitled Manuel Dominguez *et al. versus* The United States, and numbered 273, U. S. district court, southern district of California, now filed of record in my office.

Attest my hand and seal of said district court this 10th day of October, A. D. 1887.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

37 PLAINTIFFS' "EXHIBIT F."

The United States of America to all to whom these presents shall come, Greeting:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that, pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled "An act to ascertain and settle the private land claims in the State of California,"

Manuel Dominguez, Conception Roche, Bernardino Roche, Jose Antonio Aguirre, Maria Jesus Cota de Dominguez, Madalena Dominguez, Andres Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, and Jose Dominguez, as claimants, filed their petition on the 19th day of October, 1852, and Conception Roche; Maria, widow of Manuel Roche, and Antonio Jacinto Roche, as claimants, filed their petition on the 25th of July, 1854, with the commissioners to ascertain and settle private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition they claimed the confirmation of their title to a tract of land situated in the county of Los Angeles known by the name of San Pedro and containing ten square leagues, more or less, said claim being founded on a Spanish grant to Christobal Dominguez recognized by the Mexican government:

And whereas the board of land commissioners aforesaid, on the 17th day of October, 1854, rendered a decision "that the claim of the said petitioners is valid, and it is therefore decreed that the same be confirmed to them, to hold and possess the same as tenants in common in the respective shares and proportion which they hold in and to the premises thereby confirmed by title deduced from
38 Christobal Dominguez, deceased, by heirship or mesne conveyances, it being the intention to confirm to each of said petitioners the respective title held by him at the time of his becoming a party to this proceeding, derived from the source above mentioned;" which decree or decision was confirmed by the district court of the United States for the southern district of California on the tenth day of February, 1857;

And whereas it further appears from a certified transcript on file in the General Land Office that, the Attorney General of the United States having given notice that the appeal of the Supreme Court of the United States in this cause would not be prosecuted, the aforesaid district court, on the fourth day of June, 1857, "ordered that the order of this court made on the twenty-fourth day of February, A. D. 1857, granting an appeal to the Supreme Court from the decree of confirmation of this court, filed on the tenth day of February, 1857, be, and is hereby, vacated, and that the said claimants have leave to proceed under said decree as under a final decree;"

And whereas under the thirteenth section of the act of Congress of the third of March, 1851, there have been presented to the Commissioner of the General Land Office a plat and certificate of the survey of the land confirmed as aforesaid, authenticated on the 19th day of February, 1858, by the signature of the surveyor general of public lands in California; which plat and certificate are in the words and figures following, to wit:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

Under and by virtue of the provisions of the 13th section of the act of Congress of the third of March, 1851, entitled "An act
39 to ascertain and settle the private land claims in the State of California," and of the 12th section of the act of Congress

approved on the 31st of August, 1852, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirtieth of June, eighteen hundred and fifty-three, and for other purposes," and in consequence of a certificate of the United States district court for the southern district of California, of which a copy is annexed, having been filed in this office, whereby it appears that the Attorney General of the United States having given notice that it was not the intention of the United States to prosecute the appeal from the decision of the said district court by which it affirmed the decision of the board of commissioners appointed under the provisions of the said act of the third of March, eighteen hundred and fifty-one, to ascertain and settle the private land claims in the State of California, by which they recognized and confirmed the title and claims of Manuel Dominguez *et als.* to the tract of land designated as the Rancho "San Pedro," containing eight and a half square leagues, a little more or less, the said appeal has been vacated by the said district court, and thereby the said decisions in favor of the said Manuel Dominguez *et al.* have become final, I have caused the said tract to be surveyed in conformity to the boundaries specified in the said confirmatory decree, and do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof made by Henry Hancock, deputy surveyor, in the month of December, 1857, under the directions of this office, which, having been examined and approved, are now on file therein.

And I do further certify that, under and by virtue of the said confirmation and survey, the said Manuel Dominguez *et al.* are entitled to a patent from the United States upon the presentation hereof to the General Land Office for the said tract of land, the same being described as follows, to wit:

Beginning at a sycamore tree sixty inches in diameter, standing on the east of the road leading to San Pedro, marked for station number one, thence, according to the true meridian (the variation of the magnetic needle being thirteen degrees thirty minutes E.), along the line agreed upon between Don Antonio Lugo, owner of the Rancho "San Antonio," adjoining on the north, and Don Manuel Dominguez, north eighty-three degrees thirty minutes west, at seven chains and two links crosses a gully eight links wide, course south, and leaves scattering timber; at thirty-five chains and fifty-two links the center of a road crossing line at right angles; at fifty-seven chains and fifty-two links the center of a road leading from Los Angeles to San Pedro, course north and south; at fifty-nine chains and thirty links a stone near road averaging fifteen inches upon each of its four faces; at sixty-one chains and twenty links crosses a stream of water ten links wide, course southerly, sixty-two chains and three links to a stake, station number two, at a place called "La Tyera," formed by the creeks and being the southwest corner of the Rancho San Antonio, from which the house of Don Manuel Dominguez bears south eight degrees thirty minutes east, the house of Don Pedro Dominguez bears south seven degrees

thirty minutes east, and the junction of two streams of water bears south ten degrees west, distant two hundred and thirty-one links.

Thence, following the line of certain stones which had been placed as landmarks, south seventy-two degrees west, at
41 eighty-three chains crosses a stream of water eight links wide, course south, one hundred and five chains sixty links to a pile of stones, station number three.

Thence south eighty-seven degrees west eighty-one chains and ten links to a pile of three rocks, the average width of each face being fifteen inches, apparently placed here long since station number four.

Thence south seventy-one degrees fifteen minutes west, at twenty chains a pit on line in hollow; at forty chains a pit on line on rise of land; at fifty chains opposite to and three chains north of a pond of water; at sixty chains a pit on line, land sloping to the west; eighty-five chains and eighty-two links to an old pile of four rocks, station number five, from which the half-way house of Alexander and Banning bears south thirty-four degrees west and the house of Raisier bears south fifty degrees thirty minutes west.

Thence south sixty-seven degrees fifteen minutes west, at twenty chains a pit on line; at thirty-four chains the north edge of a pond of water about two chains in diameter; at forty chains a pit on line; at forty-eight chains intersects the range line, three chains and seventy-three links south of the quarter-section corner on the west boundary of section nineteen, township three south, range thirteen west, at a charred stake; at sixty chains a pit on line; at sixty-four chains crosses a dim wagon road, course south thirteen degrees west, eighty-four chains and five links to a rock thirty-two inches long, twenty-four inches wide, and eight inches thick, station number six, from which the half-way house of Alexander and Banning bears south one degree thirty minutes west and the house of Raisier bears south ten degrees and thirty minutes west.

42 Thence south sixty-nine degrees west, at five chains and fifty links the center of the road from Los Angeles to San Pedro, course south two degrees west; at twenty chains a pit on line; at forty chains a pit on line; at one hundred chains a pit on line; at one hundred and twenty chains a pit on line; at one hundred and forty chains a pit on line; at one hundred and forty-seven chains and fifty links crosses a road, course north eighty-four degrees west; at one hundred and fifty-eight chains and fifty links the center of a gulch fifty links wide, course southeast; at one hundred and sixty chains a pit on line; at one hundred and sixty-one chains and fifty links crosses a gulch twenty-five links wide, course south; at one hundred and sixty-four chains and fifty links crosses a gulch, course northeast; at one hundred and sixty-seven chains crosses a gulch, course southeast; at two hundred chains a pit at the head of a gulch twenty-five links wide, course southeast; at two hundred and twelve chains crosses a gulch fifteen links wide, course northeast; at two hundred and twenty chains a pit on line; at two hundred and forty chains a pit on line; at two hundred and fifty-

six chains the base of a hill, two hundred and sixty-one chains and two links to a rock on the top of a hill, station number seven.

Thence south fifty degrees thirty minutes east fifty chains and fifty links to a pile of rocks, station number eight.

Thence south fifty-three degrees fifteen minutes west forty-two chains and two links to station number nine.

Thence south fifty-eight degrees forty-five minutes west, at twenty-six chains a pit on line and west edge of slope of hill; at twenty-seven chains a hollow; at thirty-five chains the top of a hill;
43 at forty chains a pit on line; at sixty chains a pit on line, sixty-four chains to a rock partly imbedded in earth, station number ten, from which the mound corner to section- thirty-one, thirty-two, six, and five, on south boundary of township three south, range fourteen west, bears south eighty-six degrees east—distance, three hundred and forty-four links.

Thence south sixty-eight degrees forty-five minutes west, at sixty-six links intersects the south boundary of township three south, range fourteen west, four chains and seven links west of last-mentioned sectional corner, at a stake with pits on line; at seventeen chains and fifty links a hollow; at twenty-five chains the top of a hill; at twenty-six chains and fifty links the top of a spur, from which the boiling-house at the salt works bears south thirty-five degrees thirty minutes west and the dwelling-house at the salt works bears south forty degrees thirty minutes west; at forty-seven chains and fifty links enters the chapar-al; at fifty chains the top of a low hill; at sixty chains a pit on line; at sixty-five chains and fifty links crosses a road, course south seven degrees west; at seventy chains opposite to and eighty links north of the house of the herders of Don Jose Sepulveda; at seventy-one chains and fifty links a stake on north extremity of high-water mark of Salt lake, from which the stake ranges south six degrees east; at seventy-three chains the top of a sand bank; at seventy-six chains a hollow; at seventy-eight chains and fifty links the top of a sand hill, from which the boiling-house before mentioned bears south thirty-three degrees east and the dwelling-house south thirty-eight degrees thirty minutes east; at eighty-six chains and fifty links enters a hollow and bushes; at eighty-eight chains and fifty links leaves the underbrush; at
44 eighty-eight chains and fifty-five links a witness stake eight feet long and a deposit of three red pebble rocks, three inches long by two inches square; at eighty-nine chains the pebble beach, ninety-one chains to station number eleven, on the line of high-water mark of the Pacific ocean, the coast ranging about north twenty-two degrees west.

Thence along the beach of the ocean south twenty-three degrees fifteen minutes east twenty-two chains and twenty-six links to station number twelve.

Thence south twenty-six degrees fifteen minutes east eight chains and fifty links to station number thirteen.

Thence south thirty-three degrees east twenty chains to station number fourteen.

Thence south twenty-four degrees east thirty chains to station

number fifteen, on high-water line and commencement of a bluff bank from eight to fifteen feet high.

Thence south seven degrees thirty minutes east thirteen chains and ninety-two links to station number sixteen, at foot of perpendicular bluff fifteen feet high.

Thence south two degrees forty-five minutes west twenty-five chains to station number seventeen, at foot of bluff.

Thence south forty-five minutes west twenty chains and ninety-two links to station number eighteen, at foot of bluff.

Thence south eighty-eight degrees east, leaving the ocean at eighty-three links, the top of the bluff; at one chain a witness stake to station number eighteen; at three chains and sixty links a pile of rocks on line between this rancho and that of "Palos Verdes," and then with said line at five chains leaves the naked hills;
45 at twelve chains the top of a low hill; at twenty chains enters a hollow and crosses a trail at foot of hill, course south, thirty-two chains and ten links to a stake on the north face of a hill, station number nineteen.

Thence south eighty-four degrees thirty minutes east, at eight chains enters a hollow; at seventeen chains and fifty links the top of a range of hills; at twenty-one chains and thirty-eight links intersects the west boundary of section eighteen, township four south, of range fourteen west, ten chains and fifty-four links north of the quarter-section corner; at twenty-five chains the base of a hill; at forty-seven chains the top of the hill; at sixty chains a pit on line at base of hill and commencement of rolling plain; at eighty chains a pit on line; at one hundred and sixty-three chains crosses a road, course north sixty degrees east, one hundred and eighty-five chains and sixty-seven links to a pile of rocks, station number twenty.

Thence with the line separating this ranch from that of "Palos Verdes" south seventy-seven degrees thirty minutes east one hundred and thirty-eight chains and fifty links to a charred stake in cañon, station number twenty-one.

Thence south sixty-six degrees thirty minutes east, at forty-six chains and fifty links crosses a road to San Pedro; at sixty-eight chains crosses the road from Los Angeles to San Pedro, one hundred and four chains and sixty links to a stake and pile of rocks on the north boundary of the Rancho "Palos Verdes," station number twenty-two.

Thence south sixty-four degrees forty-five minutes east, at seven chains and forty-nine links intersects the range line one chain
46 and sixty-nine links south of the quarter-section corner on the west boundary of section nineteen, township four south, range thirteen west; at seven chains and eighty-eight links crosses a gully twenty-five links wide, course southwest; at twenty-two chains and thirty-eight links the top of the rise of the ground; at forty four chains and fifty-eight links the edge of a pond of water, forty-six chains and thirty-two links to a pile of rocks in a pond of water, station twenty-three and northeast corner of the Rancho "Palos Verdes."

Thence (the variation of the magnetic needle being thirteen de-

grees fifteen minutes east) south seven degrees thirty-two minutes east, at four chains and fifty links leaves the water; at eight chains the top of the south and east bluff of the cañada of the Palos Verdes; at thirty-five chains a willow tree thirty inches in diameter on the east bank of the cañada of the Palos Verdes bears south sixty-one degrees west, distance seventeen chains and thirty-nine links; at seventy chains crosses the south arm of a fresh-water lake fifty links wide, bearing west; at seventy-four chains and fifty links the top of the south bank of the same; at ninety-seven chains crosses a dry arm fifty links wide of the same lake; at one hundred and forty-nine chains and seventy-five links crosses another arm eight chains wide; at one hundred and fifty-five chains enters upon table-land; at one hundred and eighty-two chains and fifty-two links intersects the first standard parallel south at a stake with pits four chains and twenty-five links west of the quarter-section corner of the north boundary of section six, township five south, range thirteen west; at one hundred and eighty-nine chains and fifteen links crosses a road, course south forty-
47 six degrees west; at one hundred and ninety-three chains crosses a wagon trail, course southwest; at one hundred and ninety-five chains crosses a wagon trail, course southwest; at two hundred and two chains and fifty links the head of an inlet or bog; at two hundred and twelve chains a stake with a deposited stone twelve inches long, nine inches wide, and seven inches thick at the high-water mark of the Inner bay of San Pedro and being about three chains west of the wells of Captain Ord, in New San Pedro, and the point of intersection of two roads bears north fifty-seven degrees thirty minutes west, distant twenty-four chains and thirty-five links; at three hundred and seventeen chains and seventy-eight links the north shore of island; at three hundred and thirty-one chains and seventy-eight links across island and north shore of arm of bay; at three hundred and thirty-five chains and twenty-five links across the same to shore, three hundred and thirty-seven chains and twenty links to "Goleta," station number twenty-four. (From this station the following lines will connect this survey with the line of the public survey, viz: South eighty-one degrees seven and a half minutes west thirty-three chains and sixty-three links and thence south eighty-four degrees fifteen minutes east twenty-three chains and forty-one links to the corner of sections seven, eight, twelve, and thirteen, in township five south, ranges thirteen and fourteen west.)

Thence from the "Goleta" south thirty-one degrees thirty minutes east, at one chain the shore of the outlet or channel of the Inner bay of San Pedro; at eighteen chains the other shore of said outlet, a point of land nineteen chains and forty links to station number twenty-five, at high-water mark on the coast of the Pacific,
48 from which Timmsville bears south forty-five degrees fifteen minutes west, the warehouse of Sepulveda bears south nineteen degrees west, another warehouse bears south thirteen degrees thirty minutes west, and a rock on the east face of Dead Man's island bears south eight degrees east.

Thence along high-water mark of the ocean south sixty-eight degrees thirty minutes east three chains and eighty links to station number twenty-six.

Thence north sixty-eight degrees thirty minutes east eleven chains and thirty-one links to station number twenty-seven, from which Timmsville bears south fifty-three degrees thirty minutes west, the warehouse of Sepulveda bears south twenty-seven degrees west, the other warehouse south twenty-two degrees thirty minutes west, and the rock at Dead Man's island bears south thirty minutes east; thence north fifty degrees east ten chains and fifty links to station number twenty-eight.

Thence north forty-one degrees thirty minutes east twenty chains to station number twenty-nine.

Thence north fifty-seven degrees thirty minutes east thirty-five chains to station number thirty.

Thence north sixty degrees east sixty-six chains to station number thirty-one.

Thence north seventy-three degrees east sixty-seven chains to station number thirty-two, and

Thence north sixty-one degrees thirty minutes east twenty-three chains to station number thirty-three, from which a point of land on the opposite shore of the mouth of the Rio San Gabriel bears north fifty degrees east.

49 Thence, leaving the shore of the ocean, north twenty-seven degrees thirty minutes east, at twenty-three chains and thirty-nine links the south side of a slough, course south sixty-eight degrees west, from which the point opposite the mouth of the San Gabriel bears south sixty-one degrees east and a point of sand on the west shore bears south fifty-five degrees east, distant seven chains and twenty-five links; at twenty-five chains and fifty links to station number thirty-four, on the west bank of the River San Gabriel (at this point about six chains wide) about eight chains west of a small inlet on the east shore.

Thence up and along the west bank of the River San Gabriel north forty-nine degrees west, at nine chains crosses a slough twelve links wide, course southwest, ten chains to station number thirty-five.

Thence north eighteen degrees thirty minutes east nine chains to station number thirty-six, on the edge of slough.

Thence north seventy five degrees fifteen minutes east, at one chain and thirteen links across slough, course north twenty-five degrees west; at three chains and fifty links across a slough fifty links wide, course north fifty degrees west, ten chains to station number thirty-seven.

Thence north fourteen degrees and fifteen minutes east, at five chains and fifty links across a slough fourteen links wide, course at right angles to line, eleven chains and fifty links to station number thirty-eight.

Thence north sixteen degrees fifteen minutes west four chains and fifty links to station number thirty-nine.

Thence south sixty-five degrees west two chains and thirty links

to station number forty (average width of the river being about fifty links).

50 Thence north fifteen degrees thirty minutes west, at four chains and seventy links intersects the first standard parallel south at a stake with pits thirteen chains and ninety links east of the quarter-section corner on the north boundary of section three, township two south, range thirteen west; at fifteen chains crosses a slough twenty-five links wide, course southwesterly, nineteen chains to station number forty-one.

Thence north twenty-four degrees thirty minutes east, at nineteen chains across a slough twenty links wide, course south; at twenty-three chains and fifty links across a slough fifteen links wide, course southeast; at thirty-two chains and fifty links to inlet one chain wide, course northwest, thirty-three chains and fifty links to station number forty-two.

Thence south forty-nine degrees west three chains and fifty links to station number forty-three.

Thence north twenty-six degrees thirty minutes west twelve chains to station number forty-four, on the edge of the slough (the river here being about two chains wide).

Thence north ten degrees east, at seventy-five links across the slough, course northwest, four chains and twenty-two links to station number forty-five.

Thence north forty-three degrees thirty minutes west thirteen chains to station number forty-six, from which a red spot on bank bears north forty-seven degrees west, a corral bears north nineteen degrees west, and another corral bears north seventeen degrees forty-five minutes west.

Thence north three degrees forty-five minutes east, at three chains and fifty links crosses the road to Temple's ranch, course east,

51 thirteen chains and fifty links to station number forty-seven.

Thence north thirty-three degrees fifteen minutes west fifteen chains and seventy links to station number forty-eight, from which the red spot on the bank bears north sixty-three degrees thirty minutes west, the small house bears north sixty-eight degrees west, a corral bears north twenty-one degrees west, and the other corral bears north eighteen degrees forty-five minutes west.

Thence north six degrees east, at twenty three chains and forty-six links the edge of a bog, twenty-six chains and fifty links to station forty-nine, and across the bog from which a frame house on top of the bank bears north twenty-seven degrees west.

Thence north thirty-six degrees fifteen minutes east fifteen chains and fifty links to station number fifty, from — the frame house last mentioned bears north fifty-one degrees west.

Thence north one degree fifteen minutes west twelve chains to station number fifty-one.

Thence north seven degrees east eight chains to station number fifty-two.

Thence north thirty degrees thirty minutes east, at one chain

crosses a slough twenty-five links wide, course northwest, ten chains to station number fifty-three.

Thence north five degrees east five chains and eighteen links to station number fifty-four, from which a bunch of tules near a small lake bears north seventy-five degrees west.

Thence north thirty-two degrees forty-five minutes west seven chains and fifty links to station number fifty-five, from which the before-mentioned bundle of tules bears north eighty degrees
52 west, a tree on the west side of the small lake bears north seventy-five degrees thirty minutes west, a red spot on the face of a knoll on the bank bears north thirty-nine degrees thirty minutes west, and one or two trees bears north twenty-nine degrees thirty minutes west.

Thence north one degree east four chains to station number fifty-six, from which the tree on the northwest side of the lake bears north eighty-six degrees thirty minutes west, the tules bear south seventy-four degrees west, the knoll before mentioned bears north sixty-one degrees west, one of the two trees before mentioned bears north thirty-one degrees west.

Thence north twenty-two degrees east twelve chains and fifty links to station number fifty-seven.

Thence north one degree west six chains and fifty links to station number fifty-eight, from which one of two trees bears north forty-three degrees fifteen minutes west.

Thence north twenty-six degrees thirty minutes west five chains and thirteen links to station number fifty-nine.

Thence north one degree east three chains and eighty-seven links to station number sixty.

Thence north forty-five degrees west four chains and forty links to station number sixty-one.

Thence north five degrees east three chains and fifty links to station number sixty-two.

Thence north forty-six degrees east eight chains and thirty links to station number sixty-three.

Thence north twenty-six degrees east seven chains and twenty links to station number sixty-four.

Thence north forty degrees thirty minutes east eleven chains and forty-eight links to station number sixty-five.

53 Thence north twenty-five degrees east ten chains and fifty links to station number sixty-six, from which a willow tree fourteen inches in diameter bears north eighty-eight degrees west, distant three hundred and sixty-two links.

Thence north forty degrees thirty minutes east twenty-six chains and sixty links to station number sixty-seven.

Thence north thirty degrees fifteen minutes east eleven chains and fifty links to station number sixty-eight.

Thence north forty-four degrees forty-five minutes nine chains to station number sixty-nine, from which a willow twelve inches in diameter bears north twenty-three degrees west, distant four hundred and fifty-four links.

Thence north forty-eight degrees fifteen minutes east, at five

chains a willow thirty inches in diameter is forty links west of the line, eleven chains to station number seventy.

Thence north sixty-two degrees thirty minutes east six chains and twenty links to station number seventy-one, from which a willow fourteen inches in diameter bears north twenty-seven degrees west, distant two hundred and sixteen links.

Thence north forty-seven degrees thirty minutes east seven chains to station number seventy-two.

Thence north sixty-one degrees thirty minutes east ten chains to station number seventy-three.

Thence north forty-seven degrees fifteen minutes east seven chains to station number seventy-four.

Thence north sixty-eight degrees thirty minutes east, at two chains and fifty links crosses a road at right angles, four chains and eighty links to station number seventy-five, a sycamore tree on the
54 face of a bluff thirty-five feet high on the east bank of the river, bearing north sixty degrees thirty minutes east. Up to this station the banks of the river are from one to three feet high.

Thence north forty degrees thirty minutes east six chains to station number seventy-six, from which the sycamore last mentioned bears north eighty-eight degrees thirty minutes east.

Thence north twenty-four degrees thirty minutes ten chains to station number seventy-seven.

Thence north fourteen degrees forty-five minutes east ten chains and eighty links to station number seventy-eight.

Thence north twenty-three degrees thirty minutes east sixteen chains to station number seventy-nine.

Thence north thirty-five degrees forty-five minutes east six chains to station number eighty, from which an alder tree bears north seventy-five degrees fifteen minutes west, a red spot on the face of a hill bears north forty-six degrees west, the southwest corner of the house of Don Juan Temple bears north sixty-seven degrees east, the center one of the three Indian huts bears north fifty-eight degrees east, the southwest corner of the old house of Don Juan Temple bears north forty-eight degrees forty-five minutes east, the house of Don Manuel Dominguez bears north twenty-eight degrees thirty minutes west, and a corral bears north twenty-six degrees thirty minutes west.

Thence north sixty degrees east five chains to station number eighty-one, from which the southwest corner of Temple's house bears north sixty-nine degrees forty-five minutes east.

55 Thence north fifteen degrees thirty minutes east ten chains to station number eighty-two, from which the center of one of the three Indian huts bears south fifty-three degrees east, the southwest corner of Temple's old house bears south seventy-nine degrees thirty minutes east, and the corral bears north twelve degrees fifteen minutes east.

Thence north twenty-four degrees west eight chains and fifty links to station number eighty-three, from which the corral before mentioned bears north forty-four degrees east. The high bluff on the other side of the river ceases opposite this station.

Thence north sixty-five degrees fifteen minutes west ten chains to station number eighty-four, from which the alder tree last mentioned bears south twenty-six degrees fifteen minutes west and the red spot on the east face of the hill bears north fifty-three degrees west.

Thence north twenty-four degrees west seven chains and sixty-two links to station number eighty-five.

Thence north seventeen degrees west ten chains to station number eighty-six, from which the house of Don Manuel Dominguez bears north twenty-nine degrees and thirty minutes west.

Thence north nine degrees thirty minutes west six chains to station number eighty-seven.

Thence north twenty-eight degrees thirty minutes east twenty-one chains and twenty links to station number eighty-eight.

Thence north seventy-eight degrees west six chains and fifty links to station number eighty-nine.

Thence north fifty-one degrees forty-five minutes west, at five
56 chains and fifty links crosses the head of a sanjon fifteen links wide, course south, eight chains to station number ninety.

Thence north fifty-five degrees and fifteen minutes west six chains to station number ninety-one.

Thence north thirty-seven degrees forty-five minutes west, at four chains crosses at right angles the mouth of a slough fifteen links wide, seven chains and ninety-one links to station number ninety-two.

Thence north fifteen degrees thirty minutes east eight chains to station number ninety-three.

Thence north fifty-two degrees east, at fifty links crosses the mouth of a stream ten links wide, fifteen chains and seventy-three links to station number ninety-four.

Thence north fifty-seven degrees east seven chains and twenty-seven links to station number ninety-five, from which the house of Don Pedro Dominguez bears north fifty-three degrees west and the house of Don Nazario Dominguez bears north fifty degrees west.

Thence north seventy-seven degrees fifteen minutes east, at three chains crosses a slough fifty links wide, course northeast, six chains to station number ninety-six.

Thence north fifty-six degrees forty-five minutes east eighteen chains and thirty-seven links to stake with pits, one chain and twenty-four links east of quarter-section corner on the south boundary of section thirty-four, township three south, of range thirteen west, station number ninety-seven.

Thence (the variation of the magnetic needle being thirteen degrees thirty minutes east) north fifty-seven degrees east three chains and seventy-six links to station number ninety-eight.

57 Thence north seventy-nine degrees east six chains and thirty-one links to station number ninety-nine.

Thence north forty-three degrees fifteen minutes east five chains and seventeen links to station one hundred.

Thence north thirty degrees east nineteen chains and sixty-three links to station number one hundred and one, from which an alder

tree bears eight degrees thirty minutes east, distant four hundred and fifty-seven links.

Thence north forty-three degrees forty-five minutes east eighteen chains and eighty links to station one hundred and two.

Thence north twenty-six degrees fifteen minutes east seven chains and thirty links to station one hundred and three.

Thence north eighteen degrees thirty minutes east fourteen chains and forty links to station number one hundred and four.

Thence north twenty-six degrees fifteen minutes west five chains and fifty links to station one hundred and five.

Thence north twenty degrees east five chains to station number one hundred and six.

Thence south eighty-nine degrees east six chains and forty links to station one hundred and seven.

Thence north sixteen degrees forty-five minutes east seven chains and forty links to station number one hundred and eight.

Thence north fifty-seven degrees fifteen minutes west ten chains and eighty-one links to station one hundred and nine.

Thence north twenty-four degrees fifteen minutes west four chains and fifty links to station number one hundred and ten.

58 Thence north nine degrees thirty minutes west two chains and ninety-four links to station number one hundred and eleven, on the line between range- twelve and thirteen west, seven chains and fifty links north of corner to sections twenty-five, thirty, thirty-one, and thirty-six, in township three south.

Thence north fifty-one degrees forty-five minutes west one chain and seventy links to station number one hundred and twelve. The bank of the river is four feet high.

Thence north nineteen degrees thirty minutes west eleven chains to station number one hundred and thirteen.

Thence north five degrees west, at three chains and fifty links the base of the second bank of the river, thirteen chains and fifty links to station number one hundred and fourteen.

Thence north seventy three degrees thirty minutes east, at six chains and fifty-six links intersects the west boundary of section thirty, in township three south, of range twelve west, six chains and twenty-one links south of the quarter-section corner, seven chains to station number one hundred and fifteen.

Thence north twenty-six degrees east eleven chains and eighty-nine links to station number one hundred and sixteen.

Thence north twenty-six degrees thirty minutes west five chains and twenty-one links to station number one hundred and seventeen.

Thence north sixty degrees west, at three chains and seventy-six links intersects the west boundary of the township, ten chains and ninety-eight links north of the quarter-section corner last mentioned, five chains to station number one hundred and eighteen.

59 Thence north seventy-four degrees forty-five minutes west, at six chains the top of the bank, seven chains and fifty-three links to station number one hundred and nineteen.

Thence north thirty six degrees thirty minutes west eleven chains and thirty-five links to station number one hundred and twenty.

Thence north twenty-one degrees thirty minutes west six chains to station number one hundred and twenty-one.

Thence north thirty-nine degrees thirty minutes east nine chains and forty-three links to station number one hundred and twenty-two.

Thence north eighty-five degrees east, at eleven chains and thirty-nine links intersects the west boundary of township three south range twelve west, three chains and thirty-seven links south of the corner to section- twenty-four, twenty-five, nineteen, and thirteen, at a stake with pits; fifteen chains ninety-seven links to station number one hundred and twenty-three.

Thence north sixty-three degrees thirty minutes east fourteen chains and forty-one links to station number one hundred and twenty-four.

Thence north twenty-seven degrees thirty minutes east twenty-four chains and sixty-eight links to station number one hundred and twenty-five.

Thence north thirty-four degrees fifteen minutes east twenty-four chains and fifteen links to station number one hundred and twenty-six.

Thence north fifty-four degrees thirty minutes east four chains and fifty links to station number one hundred and twenty-seven.

Thence north thirty degrees thirty minutes east fourteen
60 chains and fifty links to station number one hundred and twenty-eight.

Thence north twelve degrees west sixteen chains to station number one hundred and twenty-nine.

Thence north sixty-three degrees forty-five minutes west fourteen chains and fifty links to station number one hundred and thirty.

Thence north forty-four degrees west eleven chains and fifty links to station number one hundred and thirty-one.

Thence north fifty-eight degrees west three chains and fifty links to a charred stake and three pits, northeast corner of this rancho and corner to the Rancho of San Antonio, as agreed upon between the respective owners thereof, and

Thence leaving the River San Gabriel and along the southern boundary of the said San Antonio rancho north eighty-three degrees thirty minutes west, at twenty-six chains and thirty links intersects the line between range- twelve and thirteen west, fifteen chains and seventy-five links north of the corner to sections thirteen, twenty-four, eighteen, and nineteen, in township three south; one hundred and forty chains and ninety-eight links to the sycamore or station number one and the place of beginning.

Excepting, reserving, and excluding from the tracts as thus surveyed that portion thereof covered by the navigable waters of the Inner bay of San Pedro, and which are included within the following-described lines, to wit:

Beginning at the stake on the high-water line of the Inner bay of San Pedro on the line between station- twenty-three and twenty-four of the survey of the rancho, and which stake is two
61 hundred and twelve chains south seven degrees thirty-two minutes east from said station number twenty-three.

Boundary Lines.

No.	Course, degrees.	Distant. Chs.	Lks.	No.	Course, degrees.	Distant. Chs.	Lks.	No.	Course, degrees.	Dist. Chs.	Lks.
1	N. 83½ W.	62	03	45	N. 43½ W.	13	00	89	N. 51¾ W.	8	00
2	S. 72 "	105	60	46	" 3¾ E.	13	50	90	" 55½ "	6	00
3	" 87 "	81	10	47	" 33¼ W.	15	70	91	" 37¾ "	7	91
4	" 71¼ "	85	82	48	" 6 E.	26	50	92	" 15½ E.	8	00
5	" 67¼ "	84	05	49	" 36¼ "	15	50	93	" 52 "	15	73
6	" 69 "	261	02	50	" 1¼ W.	12	00	94	" 57 "	7	27
7	" 50⅝ "	50	50	51	" 7 E.	8	00	95	" 77¼ "	6	00
8	" 53¼ "	42	02	52	" 30½ "	10	00	96	" 56¾ "	18	37
9	" 58¾ "	64	00	53	" 5 "	5	18	97	" 57 "	3	76
10	" 68½ "	91	00	54	" 32¾ W.	7	50	98	" 78 "	6	31
11	" 23¼ E.	22	26	55	" 1 E.	4	00	99	" 43¾ E.	5	17
12	" 26¼ "	8	50	56	" 22 "	12	50	100	" 30 "	19	63
13	S. 83 "	20	00	57	" 1 W.	6	50	101	" 43¾ "	18	80
14	" 24 "	30	00	58	" 26½ "	5	13	102	" 26½ "	7	30
15	" 7½ "	13	92	59	" 1 E.	3	87	103	" 18½ "	14	40
16	" 2¾ W.	25	00	60	" 45 W.	4	40	104	" 26¼ W.	5	50
17	" 0¾ "	20	92	61	" 5 E.	3	50	105	" 20 E.	5	50
18	" 88 E.	32	10	62	" 46 "	8	30	106	S. 89 "	6	40
19	" 84½ "	185	67	63	" 26 "	7	20	107	N. 16¾ "	7	40
20	" 77⅝ "	138	50	64	" 40½ "	11	58	108	" 57¼ W.	10	81
21	" 66½ "	104	61	65	" 25 "	10	50	109	" 24½ "	4	50
22	" 64¾ "	46	32	66	" 40½ "	26	60	110	" 9½ "	2	94
23	S. 7° 32′ "	337	20	67	" 30¼ "	11	50	111	" 51¾ "	1	70
24	" 31⅛ "	19	44	68	" 44¾ "	9	00	112	" 19½ "	11	00
25	" 68¼ "	3	80	69	" 48¼ "	11	00	113	" 5 "	13	50
26	N. 68½ "	11	31	70	" 62½ "	6	20	114	" 73¼ E.	7	00
27	" 50 "	10	50	71	" 47½ "	7	00	115	" 26 "	11	89
28	" 41⅛ "	20	00	72	" 61½ "	10	00	116	" 26½ "	5	21
29	" 57½ "	35	00	73	" 47¼ "	7	00	117	" 60 "	5	00
30	" 66 "	66	00	74	" 68½ "	4	80	118	" 74¾ "	7	53
31	" 73 "	67	00	75	" 40¼ "	6	00	119	" 36½ "	11	35
32	" 61½ "	23	00	76	" 24½ "	10	00	120	" 21½ "	6	00
33	" 27½ "	35	00	77	" 14¾ "	10	80	121	" 39½ E.	9	43
34	" 49 W.	10	00	78	" 23¼ "	16	00	122	" 85 "	15	97
35	" 18⅛ E.	9	00	79	" 35¾ "	6	00	123	" 63¼ "	14	41
36	" 75¼ "	10	00	80	" 60 "	5	00	124	" 27½ "	24	68
37	" 14¼ "	11	50	81	" 15½ "	10	00	125	" 34¼ "	24	15
38	" 16¾ W.	4	50	82	" 24 W.	8	50	126	" 54½ "	4	50
39	S. 65 "	2	30	83	" 65½ "	10	00	127	" 30½ "	14	50
40	N. 15½ "	19	00	84	" 24 "	7	62	128	" 12 W.	16	00
41	" 24¼ E.	33	50	85	" 17 "	10	00	129	" 63¼ "	14	50
42	" 49 W.	3	50	86	" 9½ "	6	00	130	" 44 "	11	60
43	" 26½ "	12	00	87	" 28½ E.	21	20	131	" 58 "	3	50
44	" 10 E.	4	22	88	" 78 W.	6	50	132	" 83½ "	140	98

62 *Traverse of Inner Bay of San Pedro to be Excluded from Survey of the Claim.*

No.	Course, degrees.	Distant. Chs.	Lks.	No.	Course, degrees.	Distant. Chs.	Lks.	No.	Course, degrees.	Dist. Chs.	Lks.
1	S. 80¾ E.	10	84	7	S. 68½ E.	16	00	13	S. 67 W.	76	50
2	" 89¾ "	9	00	8	N. 24¼ "	14	13	14	" 34¾ "	98	00
3	N. 16¾ "	25	00	9	" 46¾ "	11	50	15	N. 31½ "	19	44
4	S. 77¾ "	8	90	10	" 69¾ "	11	50	16	" 7° 32' "	125	20
5	" 0¼ W.	6	50	11	" 58½ "	16	00				
6	" 72¼ E.	15	00	12	S. 34 "	59	00				

Area with- the exterior lines of the confirmed tract, 44,219.72 acres; area within lines "7" to "16," being the lands covered by the navigable waters of the Inner bay of San Pedro, connected with the ocean, and therefore to be excluded, 1,100.50 acres; area included in the boundaries specified by the confirmatory decree, exclusive of bay, 43,119.13 acres.

Thence, according to the true meridian (the variation of the magnetic needle being thirteen degrees thirty minutes east), along the high-water line of the Inner bay of San Pedro south eighty degrees forty-five minutes east ten chains and eighty-four links to station.

Thence south eighty-nine degrees forty-five minutes east nine chains to station.

Thence north seventy-six degrees forty-five minutes east twenty-five chains to station.

Thence south seventy-seven degrees and forty-five minutes east eight chains and ninety links to station.

Thence south fifteen minutes west six chains and fifty links to station.

63 Thence south seventy-two degrees fifteen minutes east fifteen chains to station.

Thence south sixty-eight degrees fifteen minutes east sixteen chains to station.

Thence north twenty-four degrees forty-five minutes east fourteen chains and thirteen links to station.

Thence north forty-six degrees forty-five minutes east eleven chains and fifty links to station.

Thence north sixty-nine degrees forty-five minutes east eleven chains and fifteen links to station.

Thence north forty-eight degrees fifteen minutes east sixteen chains to station.

Thence south thirty-four degrees east, at nine chains crosses a slough four chains wide, course northeast; fifty-nine chains crosses a slough three chains wide, course east, and to station at sand hill.

Thence south sixty-seven degrees west seventy-six chains and fifty links to station.

Thence south thirty-four degrees forty-five minutes west ninety-

eight chains to station number twenty-five of survey of exterior boundaries.

Thence north thirty-one degrees thirty minutes west, crossing the channel or entrance to the bay, nineteen chains and forty-four links to "La Goleta," exterior boundary station number twenty-four, and

Thence north seven degrees thirty-two minutes west, crossing the said "Inner bay," one hundred and twenty-five chains and twenty links to the stake on the high-water line of the bay and commencement of this survey thereof.

Containing, exclusive of the lands above described as covered by the navigable waters of the Inner bay of San Pedro,
64 forty-three thousand one hundred and nineteen acres and thirteen-hundredths of an acre, and being designated upon the plats of the public survey as lots numbered thirty-seven, thirty-eight, and thirty-nine, in township three south, of range twelve west; lot number thirty-seven, in township three south, of range thirteen west; lot number thirty-seven, in township three south, of range fourteen west; lot number thirty-seven, in township four south, of range thirteen west; lot number thirty-seven, in township four south, of range fourteen west; lot number thirty-seven, in township four south, of range fifteen west, and lot number thirty-seven of township five south, of range thirteen west of the San Bernardino meridian line.

In testimony whereof I have hereunto signed my name and affixed the seal of said office this nineteenth day of February, A. D. 1858.

[L. S.] J. W. MANDEVILLE,
U. S. Sur. Gen'l, Cal.

(Map.)

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3rd March, 1851, have given and granted, and by these presents do give and grant, unto the said Manuel Dominguez, Conception Roche, Bernardino Roche, Jose Antonio Aguirre, Maria Jesus Cota de Dominguez, Madalena Dominguez, Andres Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, Jose Dominguez, Maria, widow of Manuel Roche, and Antonio Jacinto Roche and to their heirs the tract of land embraced and described in the foregoing survey in the re-
65 spective shares and proportions which they hold in the premises "by them deduced from Christobal Dominguez, deceased, by heirship or by mesne conveyances, but with the stipulation that in virtue of the 15th section of the said act the confirmation of the said claim and this patent shall not effect the interest of third persons:"

To have and to hold the said tract, with the appurtenances, in the respective shares and proportion- and with the stipulation aforesaid, unto the said Manuel Dominguez, Conception Roche, Bernardino Roche, Jose Antonio Aguirre, Maria Jesus Cota de Dominguez,

Magdalena Dominguez, Andres Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, Jose Dominguez, Maria, widow of Manuel Roche, and Antonio Jacinto Roche and to their heirs and assigns forever.

In testimony whereof I, James Buchanan, President of the United States, have caused the- letters to be made patent and the seal of the General Land Office to be here- affixed.

Seal of General Land Office.

Given under my hand, at the city of Washington, this eighteenth day of December, in the year of our Lord one thousand eight hundred and fifty-eight, and the Independence of the United States the eighty-third.

By the President:

JAMES BUCHANAN,
By T. J. ALBRIGHT, *Secretary.*

E. N. GRANGER,
Recorder of the General Land Office.

Recorded in vol. 1, pages 483 to 509, incl.

Recorded at the request of Manuel Dominguez December 28th, 1869, at 11 hours a. m.

66 DEFENDANT'S "EXHIBIT NO. 1."

(*Certificate No.* 807.)

THE UNITED STATES OF AMERICA:

To *whom all* these presents shall come, Greeting:

Whereas William Banning, of Los Angeles county, California, has deposited in the General Land Office of the United States a certificate of the register of the land office at Los Angeles, California, whereby it appears that full payment has been made by the said William Banning, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto, for the lot numbered one of section eight, in township five south, of range thirteen west, of San Bernardino meridian, in California, containing eighteen acres and eighty-eight hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchasad by the said William Banning:

Now know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said William Banning and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said William Banning and to his heirs and assigns forever, sub-

jected to any vested and accrued water rights for mining,
67 agriculture, manufacturing, or other purposes and rights to
ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs laws and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

[SEAL.] In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

By the President:

CHESTER A. ARTHUR,
By WM. H. CROOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded, vol. 3, page 185.

DEFENDANT'S "EXHIBIT 2."

This indenture, made the second day of April, in the year of our Lord one thousand, eight hundred and eighty (1880) between A. A. Polhamus, navigator, of Wilmington, Los Angeles county, California, party of the first part, and William Banning, of the same place, the party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, gold coin of the United
68 States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents, demise, release, and forever quitclaim, unto the said party of the second part, and to his heirs and assigns forever: all that certain lot, piece or parcel of land, situated in the said county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

A certain tract of land situate in that bay of Wilmington, county of Los Angeles, State of California, known as Mormon island and all the land adjoining thereto, to which I may have any title or claim.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular the said premises, together with the appurtenances, unto said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

A. A. POLHAMUS. [SEAL.]

Signed, sealed, and delivered in the presence of—
CHAS. SEYLER.

Minutes of Court.

(Title of Court and Cause.)

Dep't 4, A. W. Hutton, judge.

JAN. 4, 1889.

Motion for a new trial submitted and denied.

69 *Notice of Appeal.*

(Title of Court and Cause.)

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the State of California from the order made in said cause on the 4th day of January, 1889, denying the motion of said plaintiffs *from* a new trial thereof.

Dated this 4th day of March, 1889.

Yours, etc.,

HOUGHTON, SILENT & CAMPBELL,
Attorneys for Plaintiffs.

To the clerk of said superior court and Bicknell and White, attorneys for defendant.

Endorsed: Filed March 4, 1889. Chas. H. Dunsmoor, clerk, by D. E. Adams, deputy clerk. Due service and receipt of copy hereof admitted this 4th day of March, 1889. Bicknell & White, attorneys for defendant.

Notice of Appeal.

(Title of Court and Cause.)

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the State of California from the judgment therein entered in the said superior court on the ninth day of April, 1889, in favor of the defendant in said action and against said plaintiffs and from the whole thereof.

Dated this sixteenth day of April, 1889.

70 Yours, &c.,

HOUGHTON, SILENT & CAMPBELL,
Attorneys for Plaintiffs.

To the clerk of said superior court and Bicknell & White, attorneys for defendant.

Endorsed: Filed April 16, 1889. Chas. H. Dunsmoor, clerk, by F. B. Fanning, deputy. Due service and receipt of a copy hereof admitted this 16th day of April, 1889. Bicknell & White, attorneys for defendant.

(Title of Court and Cause.)

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, Charles H. Dunsmoor, county clerk of said county and *ex officio* clerk of the superior court thereof, do hereby certify that the foregoing documents and orders are full, true, and correct copies of the respective originals thereof on file and of record in my office in said cause entitled Ans. J. D. de Guyer *et als. vs.* William Banning, No. 4991; and I further certify that a good and sufficient undertaking on appeal to secure costs, in due form, has been filed in due form by said appellant on appeal from the judgment therein within the time required by law, and that a good and sufficient undertaking on appeal to secure costs, in due form, has been properly filed in my office on appeal denying a new trial thereof within the time required by law.

[SEAL.] CHAS. H. DUNSMOOR, *Clerk*,
By D. E. ADAMS, *Deputy*.

71 *Stipulation.*

(Title of Court and Cause.)

It is hereby stipulated and agreed that the appellant may have five days beyond the time allowed by the rules of said court to file the transcript on appeal therein, and it is further agreed that the transcript on appeal from the order denying a new trial of said cause shall constitute also the transcript on appeal from the judgment therein.

April 8th, 1889.

BICKNELL & WHITE,
Attorneys for Defendant.

Fifteen days further time to file above transcript.

BICKNELL & WHITE,
Attorneys for Defendant.

Filed this 2nd day of May, 1889.

J. D. SPENCER,
Clerk of said Court,
By B. C. WEIR,
Deputy Clerk.

72 (The following entries appear on the minutes of the supreme court of the State of California in the case of De Guyer *et al. vs.* Banning, No. 13240:)

(1.) Monday, August 4th, 1890.—Ordered that these causes stand submitted. De Guyer *v.* Banning. The court.

(2.) Friday, December 12th, 1890—13240. De Guyer *et al. vs.* Banning. Judgment and order reversed. Fox, J. We concur: Sharpstein, J.; Patterson, J. I dissent: Beatty, C. J. Concurring opinion: Thornton, J. Dissenting opinion: McFarland, J.

(3.) Saturday, January 10th, 1891.—No. 13240. De Guyer *v.* Banning. Rehearing granted. The court.

(4.) Monday, April 20th, 1891.—No. 13240. De Guyer *v.* Banning. Argued by Houghton, for appellant; Smith, for respondent, and submitted.

(5.) Saturday, September 6th, 1891.—No. 13240. De Guyer *v.* Banning. Judgment and order affirmed. De Haven, J. We concur: McFarland, J.; Harrison, J.; Garoutte, J.; Sharpstein, J.; Beatty, C. J.

(Here follows map marked p. 73.)

74 In the Supreme Court of the State of California. In Bank.

ANA J. DOMINGUEZ DE GUYER *et al.*, Appellants, *vs.* WILLIAM BANNING, Respondent. } No. 13240. On Appeal from the Superior Court of the County of Los Angeles.

(Filed Dec. 12, 1890.)

In Bank.

DE GUYER *et als.*, Appellants, *vs.* BANNING, Respondent. } No. 13240.

This is an action of ejectment, for the recovery of the possession of a tract of land, comprising 18.88 acres, commonly known as Mormon island, situate in the inner bay of San Pedro, in the county of Los Angeles. Defendant had judgment, from which, and an order denying a motion for new trial, plaintiffs appeal.

Plaintiffs claim under a Mexican grant, alleged, in the petition for confirmation thereof, introduced and received in evidence, to have been made early in the present century, under which it is claimed that juridical possession was given in 1817, and that the same was repeatedly acknowledged by the Spanish and Mexican governments, and particularly so by a decree of the governor of the province of California, dated December 31, 1822; of which grant confirmation was made by the district court of the United States, February 10, 1857, and patent thereon issued December 18, 1858.

Defendant claims under a patent issued by the Government of the United States, as upon a sale of the property as Government land, describing the same as lot numbered one, of section eight, in township five south, range thirteen west, San Bernardino meridian in California, dated December 30, 1881.

In addition to pleading his title, the defendant plead the statute of limitation, but upon that plea the court found against the defendant.

The only question, therefore, to be determined upon this appeal, is whether or not the title passed by the Mexican or Spanish grant, as the same was finally confirmed and patented by the Government of the United States.

The grant is of the Rancho San Pedro, made to Christobal Dominguez. The decree of confirmation is for eight and a half leagues, a little more or less, of which specific boundaries are given in the decree, giving lines and named monuments, some of which are natural and some artificial, and extending around all sides of the grant. One of these lines, as specifically described in the decree, runs directly across the outer or western border of "the inner bay of San Pedro," to La Coleta, and includes said inner bay within the exterior boundaries of the grant. As described in the decree no exception within the exterior lines there given is made, but everything passes by the grant, which lies within those exterior boundaries. It is proved and conceded that the exterior boundaries as described in the survey made by the surveyor general, and recited in the patent, are identical with those given in the decree itself. But after completing the survey of the exterior boundaries, as the same are described in the decree, the surveyor adds this paragraph:

"Excepting, reserving and excluding from the tract as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following-described lines, to wit:" and then follows with the courses and distances of the survey of such inner bay, and including therein 1,100.50 acres.

What was the purpose, and what was the legal effect of this paragraph in the certificate of survey and the subsequent field-notes of the survey in this paragraph referred *of?* An understanding of the character of the "inner bay of San Pedro" may help to solve that problem, if it is one capable of solution.

According to the map attached to the record it is a body of water jutting into the main body of the land, towards the east, from the principal or main bay of San Pedro, covering in its exterior limits 1,100.50 acres. The body of the main land of the grant surrounds it on the north, south and east. It was claimed by counsel at the argument, but we do not see that the fact appears in the record, that it is inaccessible to sea-going ships, but that at times of high water it is navigable with small craft. Manifestly, and we say this more from what seemed to be conceded at the argument than from any direct evidence in the record, it is a tract of land below ordinary high-water mark, but not a portion of the deep sea, or into which deep-sea-going vessels can be taken. Within it Mormon island is situated. At high water this island consists of a pile of rocks, covering not much more than an acre, above the surface of the water, but at medium low water it is an island of considerable extent, and at extreme low water, according to the testimony of the

defendant himself, it is not an island at all, but is accessible dry-shod from the main land.

The exception and reservation, if it be one in law, is "that portion thereof covered by the navigable waters of the inner bay," etc. The very language of this exception would certainly exclude from the exception the island, which cannot be in the nature of things "covered by the navigable waters," and this exclusion would extend to the island as shown at ordinary low-water mark. This conclusion must be inevitable, and not open to debate, if we are to be governed by these words of exception and reservation. If, on the other hand, courses, distances and quantity are to govern, in the construction of this clause, and the determination of what is covered by the reservation, then the island is necessarily a part of, and is not excluded from, the reservation. But the very language of the exception forbids such a construction. There is no word in the entire certificate of the surveyor to show that all within the survey of the inner bay is reserved, but only that part thereof which is covered by the navigable waters.

This conclusion would determine this case were it not for the fact that the 18.88 acres patented to defendant, and of which he admits himself in possession, includes much more than the island as the same appears at even ordinary low tide. Because of this fact it becomes necessary to go farther, and inquire whether the United States had any property right within that inner bay, at the date of the patent made by the Government to defendant, which its officers had the power to convey.

Returning again to the Mexican grant, of which it is conceded that juridical possession was given in 1817, and final confirmation made by the constituted authorities of the Mexican government in 1822, we find that the Judicial Department of our own Government, in 1857, finally adjudged, determined and decreed that this inner bay was included within, and was a part of, said Mexican grant, and in and by said decree gave the entire boundaries, showing that it was so included. This was a final adjudication that the lands within the inner bay never were, never became, and never could become, unless by subsequent purchase, the property of the United States. It had passed into private ownership before the conquest, and this Government was, by its treaty, bound to protect the title thereof in the Mexican grantee or his successors in interest. By its decree of confirmation the Government did so protect this title, and determined that it had no interest in the lands. There was nothing in the decree to indicate or intimate that the inner bay, or any part thereof within the lines of the boundaries there given, was excepted or reserved from the grant, or to authorize the surveyor to either survey or make such an exception or reservation. The grant was one by boundaries, and not by quantity, and was complete within itself.

Turning to the patent, which, as before stated, is dated December 18, 1858, we find that it commences with and consists of recitals of the presentation of the grant for confirmation, and of all the proceedings down to and including the decree of confirmation, and the

dismissal of appeal therefrom, followed by a recital of the certificate of survey and plat made by the Surveyor General, and then, and not till then, proceeds with the granting clause, as follows:

"Now know ye, that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress aforesaid of March 3, 1851, have given and granted, and by these presents do give and grant unto the said * * * and to their heirs, the tract of land embraced in the foregoing survey, in the respective shares," etc.

There is not in the entire granting portion of this patent, nor at any place in the entire instrument, except in the recital of the certificate of survey, a word to indicate that any exception or reservation whatever is made, either in the Mexican grant, in the decree, or in the grant or relinquishment finally made by the United States. The latter is "of the tract of land embraced in the foregoing survey." What "foregoing survey?" The one which is complete in itself, and confessedly conforms minutely to the original grant, the juridical possession given thereunder, the monuments then established, both natural and artificial, and to the decree of final confirmation; or to that survey amended by adding thereto a complete, independent and unauthorized survey, embracing 1,100.50 acres, lying wholly within the lines of the authorized survey, but to be taken out of the grant or relinquishment thereby made? This reference to survey in the granting clause of the patent is not free from ambiguity, but when construed in the light of the decree of confirmation under authority of which the patent was made, and of the law as to what the Government then possessed and could grant in the premises, it must be held that the words "foregoing survey" refer to the first of the complete surveys given in the recital, the one which confessedly conforms to the original Mexican grant and the decree of confirmation thereof; and that the second survey recited therein, descriptive of a reservation attempted to be made by the surveyor, but for which there was no warrant in law or in the decree, is surplusage, and of none effect. The patent was, in effect, but the execution of the decree of confirmation. (U. S. *vs.* Minor, 114 U. S., 242.) The officers of the Government had no power to execute the decree in part, and by the same act, or any other, to withhold execution of the balance, or make reservation of a part of that which had been adjudged to be already the property of the claimants. Nor is there anything in the language of the patent which necessarily leads to the conclusion that the President in executing this patent attempted to make any such reservation, or do less than execute the decree as a whole. The act of the surveyor in making this second survey, and describing it as of an exception or reservation, was without authority, not binding upon his superiors or the Government. The presumption is that the officers whose duty it was to prepare and execute the patent did not consider themselves bound by it, nor attempt to act upon it, and there is no language employed by them in the patent which necessarily overrides this presumption. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision (as was done in this case), it is conclu-

sive, not only on the question of title, but also as to the boundaries which it specifies." (United States *vs.* Hancock, 133 U. S., 196.) And it was the duty of the surveyor, in making survey of the claim finally confirmed, "to follow the decree of confirmation as closely as practicable." (*Id.*, also act of Congress of July 1, 1864, 13 Stat., 334.) This statute, it is true, was passed after this survey, but it established no new law—was merely declaratory of what always was the duty of ministerial officers in executing the decrees of court. In this case it was practicable to, and he did, follow the decree of confirmation minutely and exactly, and made a complete and perfect survey according to the same. That which he did afterwards, in the way of making an addenda to his survey, was in excess of his authority, and void. That the court had authority to fix and determine these boundaries definitely in its decree was settled in the Fossatt case (2 Wall., 710), and United States *vs.* Fossatt, (21 How., 447), and that when so fixed they are conclusive, is affirmed in United States *vs.* Hancock, *supra*, probably the very last case decided by that court of last resort, upon such a question. It was also so held by this court in its last decision upon this question, (United Land Association *vs.* Knight, filed September 4, 1890). And it was long since established by the Supreme Court of the United States, and has been steadily followed in this court, that when a specific tract of land is so confirmed according to ascertained boundaries fixed by the decree, the confirmee takes title, upon which he may maintain action in ejectment. (Stanford *vs.* Taylor, 18 How., 412; Natoma Water and Mining Company *vs.* Clarkin, 14 Cal., 551; Soto *vs.* Kroder, 19 *id.*, 95.) In such a case, the patent from the United States is evidence only of pre-existing title. (Waterman *vs.* Smith, 13 Cal., 418.) "Segregation was made by the decree." (Natoma W. & N. Co. *vs.* Clarkin, *supra*.) Both affirmed in Mahoney *vs.* Van Winkle (33 *id.*, 456). That when the boundaries are fixed by the decree, the survey must conform thereto, was also held by this court in Hale *vs.* Akers (69 *id.*, 167). "The survey is not an independent act, but is an act performed under the decree, and preparatory to its (the decree) being carried into effect by a patent." (Moore *vs.* Massini, 37 Cal., 436), and which patent is but the execution of the decree. (United States *vs.* Minor, *supra*.)

But it is claimed on the part of respondent that notwithstanding the authorities cited, and the principles therein established, the reservation attempted to be made by the Surveyor General, and the survey thereof, was correct and lawful, for the reason, as he claims, that no title passed by the Mexican grant, to any lands within the exterior boundaries of the grant, except such as were situate above ordinary high-water mark of the seashore. In the recent case of United Land Association *vs.* Knight, *supra*, we held that the pueblo did not take and hold, under the laws of Mexico, and under those laws could not acquire title to, lands situate below ordinary high-water mark of the seashore, and cited authorities to show that such was the Mexican law, and also the decree of confirmation in that case to show that by such decree the boundary of the pueblo, at the point under consideration, was fixed by and at high-water mark,

and so found and established by the decree. But this is not a parallel case. Here there is no question of what are or can be the rights of a pueblo under the Mexican or any other law. There is no pueblo at this point, and neither party claims under one, or under the laws relating to pueblos. One is claiming under a Mexican grant, the other under the United States direct. In that case it was conceded as having been long since established by the decisions of both State and Federal courts that the Mexican government could, and sometimes did, make private grants of lands extending below the ordinary high-water mark of the seashore. This was so held in Teschmacher *vs.* Thompzon (18 Cal., 11), and in Ward *vs.* Mulford (32 Cal., 365), and the grants there referred to, like the present one, were confirmed, patented and respected by the Government and the courts.

But even if this contention of the respondent, that nothing passed by the Mexican grant, or the patent issued in execution of the decree of confirmation thereof, lying below ordinary high-water mark, it still follows that so much of the judgment appealed from in this case as adjudges and decrees that the defendant is the owner, and entitled to the possession of the tract of land described in said judgment, to wit: the 18.88 acres described in defendant's answer, and in the patent to him, is erroneous, for according to his own testimony, which is uncontradicted, more than seventeen-eighteenths of that tract lies below ordinary high-water mark, and is, therefore, land which, if it was not granted by the Mexican government, but remained a part of the public domain, became on the 9th day of September, 1850, the property of the State of California, and the Government of the United States or its officers had no power to make a grant thereof, or give title thereto, at the date of defendant's patent. Defendant makes no other claim to the property, except that based upon his patent from the United States, and his possession thereunder. If the island was not included in the grant under which plaintiff claims, defendant's title to that might be good, but even then it could not be good to the land below ordinary high-water mark. In our judgment, however, the title, not only to the island, but to the whole of said inner bay within the exterior lines of the Mexican grant, as described in the decree of confirmation, and in the survey of exterior boundaries, passed to the claimants under said grant, and is vested in the plaintiffs.

Judgment and order reversed.

FOX, *J.*

We concur.

SHARPSTEIN, *J.*
PATERSON, *J.*

I dissent.

BEATTY, *C. J.*

Concurring Opinion.

I concur in reversing the judgment and order herein, but for other reasons than those stated in the opinion of Justice Fox.

I am of opinion that the decree of confirmation of the Rancho San Pedro includes what is called the inner bay of San Pedro. The patent, however, contains a reservation from grant, which reservation is confined to and embraces only that portion of the inner bay above mentioned, which is covered by the navigable waters of the bay. It appears from the testimony that Mormon island is not so covered. It is not so covered by the waters of the bay at ordinary high tide. I am of opinion that plaintiff is entitled to recover the island and such other portion of the tract of land sued for, described in the complaint as containing eighteen and eighty-eight one hundredths acres, as is not covered by the navigable waters of the inner bay aforesaid. The judgment and order should be reversed and the cause remanded, that the limits of such portion may be determined by the court below, and when so determined, judgment should be rendered for it in favor of the plaintiffs.

THORNTON, *J.*

Dissenting Opinion.

I dissent. This is a pure action of ejectment. Plaintiffs' asserted title to the demanded premises rests upon a patent of the United States issued for a Mexican grant under the act of Congress of March 3, 1851. By the thirteenth section of that act it is provided that after a claim under a Mexican grant shall have been confirmed "a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same." In the case at bar plaintiff claims title under a patent for a tract of land known by the name of "San Pedro;" the patent recites a plat and survey made under said 13th section of said act of March 3, 1851, and contains full copies of such survey and plat; and it then conveys to the grantees "the tract of land embraced and described in the foregoing survey." There is no other description of the land granted. Now "the foregoing survey" does not include the land sued for in this action; indeed, such land is expressly excluded. And that certainly seems to me to end the case. How can a plaintiff in ejectment recover land which is not included in the title deeds on which he relies? I am clearly of the opinion that the judgment and order should be affirmed.

McFARLAND, *J.*

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true

and correct copy of an opinion filed December 12th, 1890, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 15th day of July, A. D. 1892.

Seal Supreme Court of California.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

[Endorsed:] No. 13240. In the supreme court of the State of California. De Guyer *vs.* Banning. Certified copy of opinion. Filed —— —, —. —— ——, clerk, by —— ——, deputy clerk.

75 In the Supreme Court of the State of California. In Bank.

A. J. DE GUYER *et al.*, Appellants, *vs.* WILLIAM BANNING, Respondent. } No. 13240. On Appeal from the Superior Court in and for the County of Los Angeles.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Fox, J. We concur: Sharpstein, J.; Paterson, J. I dissent: Beatty, C. J. I concur: Thornton, J. I dissent: McFarland, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same are, hereby reversed with costs.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 12th day of December, 1890, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 15th day of July, A. D. 1892.

Seal of Supreme Court of California.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY, *Deputy.*

[Endorsed:] No. 13240. In the supreme court, State of California. Remittitur. A. J. D. de Guyer *vs.* Wm. Banning. Clerk's costs, $15.00; paid by appellant, $15.00; paid by respondent, $—; total, $15.00. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

76 In the Supreme Court of the State of California. In Bank.

A. J. D. DE GUYER *et al.*, Appellants, *vs.* WM. BANNING, Respondent. } No. 13240 On Appeal from the Superior Court of the County of Los Angeles.

By the COURT: Rehearing granted.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above-entitled cause on the 10th day of January, A. D. 1892, as shown by the records of my office.

Witness my hand and the seal of the court this 15th day of July, A. D. 1892.

Seal of Supreme Court of California.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

[Endorsed:] No. 13240. In the supreme court, State of California. De Guyer *vs.* Banning. Order. Filed —— —, —. —— ——, clerk, by —— ——, deputy clerk.

77 In the Supreme Court of the State of California. Bank.

ANA J. DOMINGUEZ DE GUYER *et al.*, Appellants, *vs.* WM. BANNING, Respondent. } No. 13240. On Appeal from the Superior Court of the County of Los Angeles.

(Filed at Los Angeles Sept. 26, 1891.)

Appeal from the superior court of Los Angeles Co. A. W. Hutton, J.

For app'ts, Houghton, Silent & Campbell, and J. S. Chapman.
For resp't, Bicknell & White; Smith, Winder & Smith, of counsel; J. E. Foulds, Lee & Scott, *amici curiæ*.

In Bank.

DE GUYER *et al.*, Appellants, *vs.* BANNING, Respondent. } No. 13240.

This is an action to recover possession of a tract of land known as Mormon island, lying within the exterior boundaries of the Inner bay of San Pedro. The plaintiffs claim the land in controversy as a part of the Rancho San Pedro, the title to which is a Spanish grant, confirmed by the U. S. district court on appeal thereto from the board of land commissioners appointed under the act of Congress of March 3, 1851, to ascertain and settle private land claims in this State, and a United States patent therefor, dated December

18, 1858. This patent conveys the land embraced in the said Rancho San Pedro, as the same was surveyed by the United States surveyor general after the confirmation of said grant, the patent referring to the survey and plat thereof for purposes of description. The survey recites that it was made in conformity to the boundaries specified in the decree of confirmation, and after giving certain named exterior boundaries, which it is contended by plaintiffs are the same as those fixed in the decree of confirmation, it proceeds as follows: "Excepting, reserving and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the Inner bay of San Pedro, and which are included within the following-described lines, to wit:" The lines thus referred to as following this general description being those which mark the exterior boundaries of the Inner bay of San Pedro.

The judgment of the superior court was in favor of defendant, and the plaintiffs appeal.

The whole controversy in this case grows out of the alleged difference between the boundaries of the said grant, as given in the decree confirming it, and those fixed in the patent, this difference being made by the exception contained in the survey above referred to.

The appellants contend:

1st. That they have title to all the land within the specific boundaries of the Rancho San Pedro, as fixed in the decree of confirmation, and that the exception contained in the patent and survey must be disregarded as unauthorized and void.

2d. That if the exception is not held to be void, that it should be construed only as embracing the navigable waters of the Inner bay of San Pedro, and not all the land within the exterior boundaries of such Inner bay, in which case the land sued for would not be within the exception.

1. In support of their first proposition the appellants insist that in surveying the Rancho San Pedro no discretionary power was vested in the U. S. Surveyor General, and that his only authority was to make a survey which would conform to the boundaries given in the decree of confirmation, and that as by this exception land is excluded from the survey which was included within the boundaries of the rancho as confirmed, it is void.

It is true the duty of that officer was to locate the confirmed grant in conformity with the decree. The Fossatt case, 2 Wallace, 714. But it does not follow that when the survey has been made, approved and acted upon by the Land Department, its correctness may be impeached or disregarded in an action of ejectment, and that, too, by one who claims under the very proceedings of which the survey was one essential part. To avoid the force of this position the appellants insist upon the broad proposition that the location of the grant was not fixed and established by the survey and patent, but by the decree of confirmation; and, that in case of a conflict between the boundaries given by the decree and those fixed by the survey upon which the patent is based, the descriptive calls given in the decree are controlling. This position cannot be up-

held, and the contrary is, we think, the established doctrine. Moore *vs.* Wilkinson, 13 Cal., 478; Teschmacher *vs.* Thompson, 18 Cal., 11; Leese *vs.* Clark, 18 Cal., 535; Chipley *vs.* Farris, 45 Cal., 527; Cassidy *vs.* Carr, 48 Cal., 339; People *vs.* San Francisco, 75 Cal., 388; Wright *vs.* Seymour, 69 Cal., 122; Beard *vs.* Federy, 3 Wallace, 478.

The reasoning in Chipley *vs.* Farris, *supra*, appears to be particularly applicable to this case. In that case it was contended that the confirmation of the grant gave the claimant a perfect title, and that he could not be divested of his title to any such lands by a patent which did not embrace them all. In answer to this the court said:

"A patent, issued under the act of 1851, is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former Government, and for the segregation of such land from the public lands of the United States; and it is a record which binds both the Government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. Leese *vs.* Clark, 18 Cal., 535. While it stands the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. * * *

"It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting—as he must—the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect, in an action of ejectment."

It is unnecessary to quote further from the decisions on this point. Those above cited establish the proposition, that upon the confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant.

The obligation assumed by the United States to protect the rights of claimants under Mexican grants was political in its character, and the manner in which this should be met, and the effect to be given the prescribed proceedings in relation to the establishment of such rights, were matters of legislative policy, and the evident purpose of the act of March 3, 1851, was not only to confirm and protect the rights of claimants under Mexican grants, but also to seg-

regate from the public domain the lands thus confirmed to such grantees, so that it might be known what lands in the State were subject to settlement by citizens of the United States. To accomplish this end the act provided for a survey of all confirmed grants to be made under authority of the Government, and for the issuance of a patent thereon, which should be conclusive evidence of the location of the grant. It follows from this that in ascertaining the boundaries of the Rancho San Pedro, we must look to the patent, and if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control.

2. The remaining question is, whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception properly construed embraces all the lands within the exterior boundaries of the Inner bay of San Pedro, as shown on the map accompanying the patent, and is not confined simply to such land as is covered by the navigable waters of that bay. That this is the true meaning of the exception is made to appear not only from the fact that the Inner bay of San Pedro is marked "excepted" upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, "exclusive of the lands above described, as covered by the navigable waters of the Inner bay of San Pedro," as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the Inner bay of San Pedro, as marked on said map.

We hold, therefore, that the land in controversy is not a part of the Rancho San Pedro, as patented by the United States, and the judgment of the superior court is right.

Judgment and order affirmed.

DE HAVEN, *J.*

We concur:

McFARLAND, *J.*
HARRISON, *J.*
GAROUTTE, *J.*
SHARPSTEIN, *J.*
BEATTY, *C. J.*

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed September 26th, 1892, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 15th day of July, A. D. 1892.

Seal Supreme Court of California.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

[Endorsed:] No. 13240. In the supreme court of the State of California. De Guyer *vs.* Banning. Certified copy of opinion. Filed —— —, —. —— ——, clerk, by —— ——, deputy clerk.

78 In the Supreme Court of the State of California. Bank.

ANA J. D. DE GUYER *et al.*, Appellants, *vs.* WM. BANNING, Respondent. | No. 13240. On Appeal from the Superior Court in and for the County of Los Angeles.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by De Haven, J.

We concur: McFarland, J.; Harrison, J.; Giroutte, J.; Sharpstein, J.; Beatty, C. J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same are hereby, affirmed.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 26th day of September, 1892, and now remaining of record in my office.

Seal Supreme Court of California.

Witness my hand and the seal of the court, affixed at my office, this 15th day of July, A. D. 1892.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY, *Deputy*.

[Endorsed:] No. 13240. In the supreme court, State of California. Remittitur. A. J. de Guyer *et al. vs.* Wm. Banning. Clerk's costs, $20.00; paid by appellant, $15.00; paid by respondent, $5.00; total, $20.00. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

79 In the Supreme Court of the State of California.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE WATSON, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs and Appellants,

vs.

WILLIAM BANNING, Defendant and Respondent.

To the Hon. W. H. Beatty, chief justice of the supreme court of the State of California:

Your petitioners respectfully represent that on the 26th day of September, 1891, a final judgment was made and entered by this court in the above-entitled case, then pending on appeal therein.

That the action involves the validity of a title to certain real estate claimed by the above-named plaintiffs and appellants under a treaty of the United States, and under certain statutes of the

United States, and under a commission held under the United States, and under an authority exercised under the United States, the same being a title claimed by plaintiffs as a Mexican grant, guaranteed to them by the treaty of the United States with Mexico, duly ratified and published by the President of the United States on the 4th day of July, 1848, and known as the treaty of Guadalupe Hidalgo, which said title was confirmed to them by the decision of the board of land commissioners to ascertain land claims in
80 California, established by act of Congress approved March 3rd, one thousand eight hundred and fifty-one, and which said decision was affirmed on appeal by the district court of the United States for the southern district of California, and thereupon became final; whereupon, the United States surveyor general for California having surveyed said grant as so confirmed under and by virtue of powers imposed upon him by Congress, by the acts of Congress passed with regard to survey of land grants in California, a patent of the Government of the United States was duly executed and issued to said plaintiffs under the great seal and signed by the proper authorities of said Government, as provided by act of Congress in that behalf.

That said title so claimed by plaintiffs was specially set up and claimed by said plaintiffs herein as being by them so held under said treaty, acts of Congress, confirmation, survey, and patent, and that the decision of this court was against said title.

Your petitioners further represent that the said judgment was erroneous in thus deciding, and that the case comes within the appellate jurisdiction of the Supreme Court of the United States, all of which will more fully appear by reference to the record of said case and the copy thereof herewith presented.

Your petitioners further say that since the said decision and judgment herein these petitioners have, by virtue of proper mesne conveyances, become vested with all the right, title, and interest of the said plaintiffs in the premises and now hold the same, and that the undersigned, H. T. Lee, a counselor of this court, has been retained by the petitioners to appear and act for them in the matter of this petition.

81 Wherefore your petitioners pray for the allowance of a writ of error from the said Supreme Court of the United States to this court and for such other process as will enable your petitioners to obtain a review and a correction of the errors alleged by the said Supreme Court of the United States.

And that said writ of error do issue in the name of the said plaintiffs at the instance and for the behoof of these petitioners.

And your petitioners will ever pray, etc.

LOS ANGELES TERMINAL LAND COMPANY, *a Corporation*, AND GEORGE CARSON, *Trustee, Petitioners*,
By H. T. LEE, *Their Attorney*.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

T. B. Burnett, being duly sworn, deposes and says that he is an officer, to wit, a director and the vice-president, of the Los Angeles Terminal Land Company, one of the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the facts therein stated are true.

T. B. BURNETT.

Subscribed and sworn to before me this 1st day of July, 1892.

B. E. TANEY,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) Filed July 15th, 1892. L. H. Brown, by Geo. A. McCalvy, deputy.

82 In the Supreme Court of the State of California.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE WATSON, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs and Appellants,

vs.

WILLIAM BANNING, Defendant and Respondent.

Upon reading the petition of the Los Angeles Terminal Land Company, a corporation, and George Carson, trustee, the grantees of the above-named plaintiffs since rendition of judgment, praying for the allowance of a writ of error from the Supreme Court of the United States to this court, to be issued in the name of said plaintiffs at the instance and for the behoof of said petitioners, to review the judgment of this court heretofore rendered, to wit, on the 26th day of September, 1891, and it appearing from the said petition and the record of the case that a proper case for the allowance of said writ is presented—

It is ordered that the same be allowed.

W. H. BEATTY,
Chief Justice of California.

Endorsed: Filed July 15th, 1892. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State in which a decision could be

had in the suit between Ana J. Dominguez de Guyer, Maria D. Dominguez de Watson, Victoria Dominguez de Carson, Gaudalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, as plaintiffs, and William Banning, as defendant, wherein was drawn in question the validity of a title claimed under a treaty, statute, statutes, and authority exercised under the United States and the decision was against the validity of said title set up and claimed by said plaintiffs under said treaty, statute of, or commission under or authority exercised under the United States, a manifest error hath happened, to the great damage of the above-named plaintiffs and their grantees, the Los Angeles Terminal Land Company, a corporation, and George Carson, trustee, as by their complaint appears, *we*, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of September, A. D. 1892, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to
84 be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 18th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States,
Ninth Circuit, Northern District of California.

Allowed by—
W. H. BEATTY,
Chief Justice of California.

Filed Aug. 9th, 1892.

L. H. BROWN, *Clerk,*
By GEO. A. McCALVY, *Deputy.*

85 THE UNITED STATES OF AMERICA, *ss:*

To William Banning, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the third Monday of September, A. D. 1892, pursuant to writ of error allowed and filed in the clerk's office of the supreme court of the State of California, wherein Ana J. Dominguez de Guyer, Maria D. Dominguez de Watson, Victoria Dominguez de Carson, Guadalupe M. Dominguez,

Susana A. Dominguez, and Maria de L. R. Dominguez are plaintiffs in error, at the instance of and for the behoof of the Los Angeles Terminal Land Company, a corporation, and George Carson, trustee, and you are the defendant in error, to show cause, if any there be, why the judgment rendered, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of California, this 8th day of August, A. D. 1892, and of the Independence of the United States the one hundred and sixteenth.

[Seal Supreme Court of California.]

W. H. BEATTY,
Chief Justice.

Service of the within citation by copy admitted this 15th day of August, 1892.

WILLIAM BANNING.
BICKNELL & WHITE,
Att'ys for William Banning, Def't in Error.

86 *Security for Costs.*

In the Supreme Court of the United States.

Know all men by these presents that we, The Los Angeles Terminal Land Company, a corporation duly organized and existing under the laws of the State of California and having its principal place of business at the city of Los Angeles, county of Los Angeles, in said State, and George Carson, of said county of Los Angeles, as principals, and W. H. Workman and D. McFarland, both of said county of Los Angeles, as sureties, are held and firmly bound unto William Banning, of said county of Los Angeles, in the full and just sum of one thousand dollars ($1,000.00), to be paid unto the said William Banning, his representatives *representatives* or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

87 Sealed with our seals and dated this 27th day of July A. D. 1892.

Whereas lately, at a term of the supreme court of the State of California held, to wit, on the 26th day of September, A. D. 1891, in a suit pending in said court between Ana J. Dominguez de Guyer *et al.*, as plaintiffs, and the aforesaid William Banning, as defendant, judgment was rendered against the plaintiffs, and the above-bounden principals hereto having obtained a writ of error in the name of said plaintiffs for the behoof of said principals hereto to reverse the said judgment in the aforesaid suit, and filed a copy thereof in the clerk's office of said court, and having also obtained a citation directed to the said defendant in said suit, citing and admonishing him, the said defendant, to be and appear at the Supreme

Court of the United States to be holden at Washington on the third Monday of September, A. D. 1892:

88 Now, the condition of the above obligation is such that if the aforesaid principals hereto shall prosecute the said writ of error to effect and shall answer all costs if they fail to make the plea of the plaintiffs in error good, then the above obligation to be void; else to remain in full force and virtue.

[Corporate Seal.]

LOS ANGELES TERMINAL LAND CO.,
By WM. WINCUP, *Secretary.*
GEO. CARSON. [SEAL.]
W. H. WORKMAN, *Surety.* [SEAL.]
D. McFARLAND, *Surety.* [SEAL.]

Signed and sealed in the presence of—
GEORGE HINDS.

STATE OF CALIFORNIA, } 88:
County of Los Angeles, }

W. H. Workman and D. McFarland, the sureties in the foregoing obligation, being each sworn, each for himself says that he is a resident of the State of California and a freeholder therein, and is worth the sum of two thousand (2,000) dollars over and above his just debts and his liabilities, exclusive of property exempt by law from execution.

89 (Signed) W. H. WORKMAN.
D. McFARLAND.

Subscribed and sworn to before me, the undersigned, a notary public in and for said county of Los Angeles, State of California, this 27th day of July, A. D. 1892.

[NOTARIAL SEAL.] RICHARD D. LIST,
Notary Public, Los Angeles County, California.

The foregoing bond is hereby approved this 9 day of August, A. D. 1892.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed Aug. 9, 1892. L. H. Brown, clerk, by Geo. A. McCalvy, deputy.

90 In the Supreme Court of the State of California.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE Watson, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs in Error,
vs.
WILLIAM BANNING, Defendant in Error. } 13240.

Clerk's Certificate.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the foregoing eighty-nine (89) pages, numbering from one to eighty-nine (89), both numbers inclusive, including copy of patent map hereto annexed, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return of the annexed writ of error; and I further certify that a true copy of the said writ of error has been lodged in the supreme court of the State of California for said defendant in error, William Banning.

Witness my hand and the seal of said supreme court this 18th day of August, 1892.

[Seal Supreme Court of California.]

L. H. BROWN, *Clk*,
By GEO. A. McCALVY, *Dep'ty*.

91 In the Supreme Court of the State of California.

13240.

Assignment of Errors.

In the Supreme Court of the United States of America, October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-two.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE WATSON, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs in Error,
vs.
WILLIAM BANNING, Defendant in Error.

The plaintiffs in error say that in the foregoing record of proceedings in the above-entitled cause there is manifest error, in this, to wit:

First. The trial court committed errors of law in the particulars specified in the bill of exceptions contained in the transcript forming a part of the record herein, and therefore erred in rendering judgment against the plaintiffs, and the supreme court of the State of California erred in affirming the said judgment.

Second. The evidence was insufficient to sustain the findings of the trial court in the particulars specified in the specifications of the insufficiency of the evidence contained in the said tran-
92 script, and the said trial court erred in denying a new trial of the cause, and the said supreme court of the State of California erred in affirming the said order denying the new trial.

Third. The said supreme court erred in holding that the action of the United States surveyor general and the officers of the United States Land Department was valid and effectual, whereby they attempted in the final survey and patent of the San Pedro rancho to exclude, reserve, and except a tract containing eleven hundred acres, including the premises in question, from and out of the said ranch as the same was definitely described by metes and bounds and confirmed to the claimants in and by the decree of confirmation of the United States district court.

Fourth. The said supreme court erred in so construing said patent as to exclude from the operation thereof the said tract of eleven hundred acres.

Fifth. The said supreme court erred in so construing the said patent as to exclude from the operation thereof that part of the premises in question not actually and in fact covered by the navigable waters of the Inner bay of San Pedro.

Wherefore the said plaintiffs in error pray that the judgment of the supreme court aforesaid affirming the judgment and order denying a new trial of the superior court aforesaid and the said judgment and order of the superior court aforesaid may be reversed.

H. T. LEE,
Attorney for Plaintiffs in Error.

93 I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the assignment of errors in the foregoing-entitled cause, & that a copy thereof has been lodged in my office for said William Banning, as shown by the records of my office.

Witness my hand and the seal of the court this 22nd day of July, A. D. 1892.

[Seal Supreme Court of California.]

L. H. BROWN, *Clerk*,
By G. E. MADISON,
Deputy Clerk.

94 In the Supreme Court of the State of California.

13240.

Assignment of Errors in Addition to Those Certified with the Record.

In the Supreme Court of the United States of America, October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-two.

ANA J. DOMINGUEZ DE GUYER, MARIA D. DOMINGUEZ DE WATSON, Victoria Dominguez de Carson, Guadalupe M. Dominguez, Susana Dominguez, and Maria de L. R. Dominguez, Plaintiffs in Error,

ag'st

WILLIAM BANNING, Defendant in Error.

The plaintiffs in error say that in the foregoing record of proceedings in the above-entitled cause there is manifest error, in this, to wit:

First. The trial court committed error of law in finding that neither the plaintiffs nor any of them were on the 1st day of September, A. D. 1884, or at any other time or now seized in fee or possessed of or entitled to the possession, as tenants in common
95 or otherwise, of all or any part of the land described in the complaint herein, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Second. The trial court committed error of law in refusing to find that the plaintiffs were on the 1st day of September, A. D. 1884, the owners and seized in fee and possessed and entitled to the possession as tenants in common of all of the land described in the complaint herein, and therefore erred in rendering judgment against the plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Third. The trial court committed error of law in finding that on the said 1st day of September, 1884, or at any other time defendant did not oust or eject the plaintiffs or any of them from the possession of said land, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Fourth. The trial court committed error of law in finding that the defendant has not at any time wrongfully or unlawfully withheld from the plaintiffs or any of them the possession of any part of said land, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Fifth. The trial court committed error of law in refusing to find that the defendant did on the said 1st day of September, 1884,
96 wrongfully and unlawfully and without right or title enter into and upon the said land and premises and oust and eject

the plaintiffs therefrom, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Sixth. The trial court committed error of law in refusing to find that the defendant ever since said 1st day of September, 1884, wrongfully and unlawfully withheld and still and now wrongfully and unlawfully does withhold possession of the said land from the plaintiffs, to their wrong, injury, and damage, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Seventh. The trial court committed error of law in finding that neither the plaintiffs nor any of them have, by reason of any act of defendant, suffered any wrong, injury, or damage, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Eighth. The trial court committed error of law in finding that neither the plaintiffs nor any of them have been deprived by reason of the defendant's holding such possession nor by the circumstances thereof will any of the plaintiffs be deprived of the use or occupation of the same, to the loss or damage to them or any of them in the sum of $1,000 or any other sum, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

97 Ninth. The trial court committed error of law in refusing to find that by reason of the unlawful withholding of the said land by the defendant plaintiffs have been deprived and by the continuance thereof will be deprived of the use and occupation of the same, to their loss and damage in the sum of $1,000, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Tenth. The trial court committed error of law in finding in paragraph fifth of its findings that it had thereinbefore found that the defendant prior to the 1st day of September, 1884, entered into and ever since has been in the quiet and peaceable possession of the tract of land in the complaint described, holding and claiming the same adversely to the plaintiffs and adversely to all other persons, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Eleventh. The trial court committed error of law in finding that neither the plaintiffs nor any of them nor their ancestors, predecessors, or grantors or any of them *was* seized or possessed of all or any part of the said land within five years before the commencement of this action, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twelfth. The trial court committed error of law in finding that the defendant is the owner in fee of the whole of that cer-

98 tain piece or parcel of land described in his cross-complaint herein, and therefore erred in rendering judgment against

plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Thirteenth. The trial court committed error of law in finding that the claim of the plaintiffs and each of them is without any right whatever, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Fourteenth. The trial court committed error of law in finding that neither of the said plaintiffs have any estate, right, title, or interest whatever in said land or in any part thereof, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Fifteenth. The trial court committed error of law in finding as a conclusion of law that neither of the plaintiffs have any right, title, or interest in or to any portion of the land described in the complaint, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Sixteenth. The trial court committed error of law in finding as a conclusion of law that the defendant is the owner in fee of the whole of said land, the same being the land described also in his cross-complaint, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in
99 affirming said judgment.

Seventeenth. The trial court committed error of law in finding as a conclusion of law that the claim of each of the plaintiffs to an interest in the said land is without any right whatever, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Eighteenth. The trial court committed error of law in finding as a conclusion of law that the defendant is entitled to judgment, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Nineteenth. The trial court committed error of law in finding as a conclusion of law that the plaintiffs take nothing herein, and that the defendant recover of plaintiffs his (the defendant's) costs of this action, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twentieth. The trial court committed error of law in directing that judgment be entered accordingly, and therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-first. The trial court committed error of law in rendering judgment against plaintiffs by its judgment of June 13, 1888, and the supreme court of the State of California erred in affirming said judgment.

100 Twenty-second. The trial court committed error of law in admitting in evidence against the objection of plaintiffs

counsel a map marked "Map of land of Manuel Dominguez, filed June 5, 1880, at 4 o'clock and forty minutes p. m., at the request of Manuel Dominguez—Charles Lamb, county recorder, by C. H. Dunsmoor, deputy;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-third. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel the entries appearing on page 237 of the Assessment Book of 1881, vol. 2, so far as the same relates to fractional section 8, township 5 south, range 13 west, 204 acres; which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-fourth. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel the entry in the book for the year 1881 as follows: "All the above property, situate in Los Angeles county, filed June 5, 1880;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in
101 affirming said judgment.

Twenty-fifth. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel entries in the Assessment Book for the Year 1882, No. 2, vol. 1, so far as the same relates to the assessment of fractional section 8, township 5 south, range 13 west, 204 acres, with the further entry appearing thereon at the head of the list, "Manuel Dominguez, Wilmington, all the following-described premises, as per map of the Rancho San Pedro, now on file in the office of the county recorder of Los Angeles county, filed June 5, 1880," and a further entry which appears at the foot of the last-described entry, "All above-described property, situate in the county of Los Angeles, as per map of the Rancho San Pedro, now on file in the office of the county recorder, filed June 5, 1880;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-sixth. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel the entries upon page 73 of the Assessment Book for the Year 1883, marked vol. 2, in so far as the same relates to fractional section 8, township 5 south, range 13 west, containing 204 acres, with the entry at the head of the list, "All of the following-described property, as per map of the Rancho San Pedro, now on file in the office of the county recorder of the county of Los Angeles, filed
102 June 5, 1880;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-seventh. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel certain entries appearing upon page 233 of the Assessment Book 84, vol. 3, in so far as the same relates to fractional section 8, township 5 south, range 13 west, containing 204 acres, at the end of which entries appears the words, "All the following-described property, as per map of the Rancho San Pedro, now on file in the office of the county recorder of Los Angeles county, filed June 5, 1880;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

Twenty-eighth. The trial court committed error of law in admitting in evidence against the objection of plaintiffs' counsel the entries appearing upon page 222 of the Assessment Book *page* 55, vol. 3, in so far as the same relates to fractional section 8, township 5 south, range 13 west, 204 acres, the head being, "In Los Angeles county, San Pedro rancho, as follows, to wit;" which ruling of the court was duly excepted to by plaintiffs' counsel, and the said trial court therefore erred in rendering judgment against plaintiffs, and the supreme court of the State of California erred in affirming said judgment.

103 Twenty-ninth. The trial court committed error of law in making its order of January 4th, 1889, denying plaintiffs' motion for a new trial herein, and the supreme court of the State of California erred in affirming said order.

JEFFERSON CHANDLER,
Att'y for Pl'ffs in Error.

104 [Endorsed:] Supreme court, State of California. Ana J. Dominguez de Guyer, Maria D. Dominguez, *et al. vs.* William Banning. Assignment of errors. Jefferson Chandler, counsel for plaintiffs in error, 120 Broadway, N. Y.

Endorsed on cover: Case No. 15,166. California supreme court. Term No., 175. Ana J. Dominguez de Guyer, Maria D. Dominguez de Watson, *et al.*, plaintiffs in error, *vs.* William Banning. Filed October 8th, 1892.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 175.

DE GUYER *vs.* BANNING.

It appears from the Record, page 11, by the testimony of the defendant himself, that he entered upon the property in controversy without any title whatever, plaintiff having prior possession. Under these circumstances the plaintiff cannot be required to contest with defendant the validity of plaintiff's title. Defendant was an intruder.

Foot *vs.* Murphy, 76 Cal., 104.

It was not necessary in order to maintain plaintiff's possession that the property should be enclosed by fence.

Sheldon *vs.* Mull, 67 Cal., 299.

McCreary *vs.* Everday, 44 Cal., 246.

Sunol *vs.* Hepburn, 1st Cal., 254.

Prior possession is adequate to justify recovery by the plaintiff.

Goodwin *vs.* Scheerer, 106 Cal., 690.

California court recently held that court had jurisdiction over survey when boundaries are fixed by decree as distinguished in cases of floating grant.

103 Cal., 222.

Plaintiff has the decree and should prevail under it until the decree is set aside.

Newell on Ejectment, 468.

When the equities of the claimant are established, patent issued to another is void.

Worth *vs.* Roseberry, 98 Cal., 118.

There is a difference between a floating grant and a grant with specific boundaries fixed by a court.

18th Wallace, 266–'70.

Where equity is established in plaintiff he will prevail in ejectment. See particularly—

Newell on Ejectment, 720; also 469, 470.

The plaintiff will prevail in ejectment though unable to prove the regularity of all proceedings giving him title.

Mayor of New York *vs.* Carlton, 113 N. Y., 289.

City's possession was sufficient to justify recovery against defendant, who had no title.

Same, 290.

As against a subsequent intruder, prior position is sufficient to justify recovery.

Same case, 292.

A deed from the Government not in possession and not shown to own title is no evidence of title.

Miller *vs.* R. R., 71 New York, 383.

If prior possession be shown the party will recover in ejectment unless defendant has a better title.

Carlton *vs.* Dorey, 90 N. Y., 573.

In the above case plaintiff showed no paper title. Strength of title is made out by establishing prior possession.

Hubbard *vs.* Barry, 21 Cal., 323–'5.

Possession gives right of action against an intruder.

41 Cal., 278, Bynette *vs.* Culfield.

Prior possession is adequate for recovery against an intruder.

Newell on Ejectment, 433–'4.

Beattie, chief justice court of California, holds that there is a difference between boundaries fixed by decree and a floating grant.

103 Cal., 222.

The Government originally had no title to this land or any part of it. The judicial effect of the decree rendered establishing the boundaries of the original grant made it legally impossible for the Government to acquire the excepted part against the terms of that decree. The exception of the survey, if it operated in law to withdraw the excepted part of the grant from the patent, could not operate in law to vest title to the excepted part affirmatively in the Government against the terms of said decree. An exception in a conveyance gives no title to a third person.

45 New York, 703.

JEFFERSON CHANDLER.

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Plaintiffs in Error,
vs.
WILLIAM BANNING.

No. 1[illegible] 24

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief and Argument of JEFFERSON CHANDLER for Plaintiffs in Error.

Supreme Court of the U. S.

October Term, 1895.

ANA J. DOMINGUEZ DEGUYER,
MARIA D. DOMINGUEZ DEWATSON, et al,
Plaintiffs in Error, No. 175.
vs.
WILLIAM BANNING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

This is an action of ejectment brought in the Superior Court of the County of Los Angeles, California. The land in dispute is 18.88 acres known as Mormon Island, situate within the exterior boundaries of a Mexican grant called the Rancho San Pedro, and within the exterior boundaries of the survey thereof.

The trial court decided the case for defendant, whereupon plaintiffs appealed to the Supreme Court of the State of California, which court decided for plaintiffs, reversing the judgment of the court below. The written opinion of the court therein is found on pages 42-47, inclusive, of the record, whereupon defendant moved for and secured a rehearing in said cause, after which said second hearing the case was decided for defendant. The second opinion of the said Supreme Court is found on pages 50-53, inclusive, of record.

The controversy may be stated in a few words. Plaintiffs claimed under a Mexican grant, within the exterior boundaries of which Mormon Island, the land

in dispute, is situate. The boundaries of said Mexican grant were judicially found by the United States District Court as provided by law, which boundaries, so fixed, embraced the now disputed land. The United States appealed, but afterwards stipulated that the decree should stand. Page 21 of record. After said boundaries had been so fixed by a decree of said court, the grant was surveyed as required by law. The exterior boundaries of the grant found, fixed and declared by the survey were identical with the exterior boundaries fixed in the decree. After so finding and fixing the said boundaries in the survey, the Surveyor General, without authority of the decree or of law, as is claimed, at the conclusion of a complete description of the land surveyed, incorporated into or added to the survey (see page 34) the following language "excepting, reserving and excluding from the tracts as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro and which are included within the following described lines to-wit." (Here follows a separate statement of the boundaries of the excepted part [pages 34 and 35 of record].) Whereupon a patent was issued to the grantee under the Mexican grant conveying to him the tract of land embraced and described in the foregoing survey. See page 37 of record. The Government afterwards executed a patent to defendant for said 18.88 acres. The legal significance of the said exception, reservation or exclusion is involved, and also the legal value of defendant's subsequent patent for the part described in the so-called exception.

Plaintiffs' claim that said exception is repugnant to the general terms of the survey and is void and of no

consequence. Defendant claims that the exception not only withdrew the excepted part from the grant and decree, and the exterior boundaries of the survey itself but vested title thereto in the United States, and that his patent therefor executed by the officers of the United States authorized generally to issue patents, constituted him the owner thereof.

Points and Authorities.

Point 1.

The following facts are established: (Record pages 10 and 43.)

1. The decree of confirmation defined the exterior boundaries of the grant.
2. The exterior boundaries of the grant are also fixed by the survey and are identical with the exterior boundaries fixed by the decree.
3. The land in dispute "Mormon Island," lies wholly within the exterior boundaries so fixed by the decree and survey.

The court erred in its first finding of fact, page 5 of record, that plaintiffs had no title to the land sued for; and erred in its first declaration of law, and its first provision of the judgment found on page 7 of record, that plaintiffs take nothing by their writ; which errors are set up in the assignment of errors, page 62 of record.

Plaintiffs claim that on the face of the record and the conceded facts, judgment should have been for plaintiffs on the grounds, among others, stated in the first opinion of the Supreme Court of California, found on pages 42 to 47 of record.

The ground upon which the second and adverse decision of the Supreme Court of California rests is stated on page 51 of the record, as follows:

"It is true the duty of that officer (surveyor) was to locate the confirmed grant in conformity with the decree. The Fossatt case, 2 Wallace, 714. But it does not follow that when the survey has been made, approved and acted upon by the Land Department, its correctness may be impeached or disregarded in an action of ejectment, and that, too, by one who claims under the very proceedings of which the survey was one essential part. To avoid the force of this position the appellants insist upon the broad proposition that the location of the grant was not fixed and established by the survey and patent, but by the decree of confirmation; and, that in case of a conflict between the boundaries given by the decree and those fixed by the survey upon which the patent is based, the descriptive calls given in the decree are controlling. This position cannot be upheld, and the contrary is, we think, the established doctrine."

This statement does not fairly present the plaintiffs' contention, nor in full. Plaintiffs do claim that it was the duty of the surveyor to find and declare the boundaries fixed in the decree as stated in 2d Wallace, 714; and that, when so done, his jurisdiction ceased. And plaintiffs claim further that there is no conflict between the decree and survey. Plaintiffs claim that the decree and its boundaries are called for by the patent, (see pages 22 and 23 of record), and that the survey and patent declare that the boundaries of the decree are the boundaries of the survey. The patent recites, on page 22 of record, that a decree had been rendered for claimant, and alludes to the transcript in the case and

the stipulation of the Attorney General. On page 23 the patent says, reciting the language of the survey, "I have caused the said tract to be surveyed in conformity to the boundaries specified in the said confirmatory degree."

The boundaries of the grant fixed by the decree are called for in the patent, and the patent says that the survey conforms to the boundaries "*specified in the decree.*" How, then, can it be claimed that the patent conflicts with the decree, when it sets it out and adopts the boundaries of the decree and makes them the controlling consideration of the survey. The original grant is fully visible in the patent. It doubly appears, first, in the decree brought into the patent; and, second, by the survey also brought into the patent. The parol evidence on page 10 of the record, admitted without objection, also shows the identity of the exterior boundaries of the grant as stated in the decree and of the said boundaries in the survey; both are set up in the patent. They are identical. The court, in its first opinion, so declares. (Page 43 of record).

Added to this, particular attention is called to the granting part of the patent, found on page 37 of record. It is "Know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the Act of Congress of March 3, 1851, have given and granted, and by these presents do give and grant unto, &c., and to their heirs, the tract of land embraced and described in the foregoing survey." In the first decision, page 45 of record, this language is held to include the land within the exterior boundaries of the survey. Indeed, it cannot be otherwise, for that embraced in the foregoing survey necessarily takes all

within the exterior boundaries of the survey. The survey exists only in the boundaries thereof. The utmost that can be said against this view is that the patent in this respect is ambiguous on its face. This even is not so, for the effect of the granting clause of the patent is to ignore the exception in the survey and grants all within the survey.

Point 2.

This is an action of ejectment. Defendant claims, and the court so hints, that in such an action documents showing title must be accepted in their terms and construed literally; that the exception in this particular survey is binding on plaintiffs and cannot be rejected though repugnant to the judicial decree, and to the main body of the survey itself.

Plaintiffs affirm that a court having jurisdiction of an action in ejectment, is authorized to determene the legal effect of the public documents offered to sustain or disprove title.

In this case both parties claim through a Mexican grant. Plaintiffs by virtue of such grant. The defendant does not dispute the grant, nor the decree, nor the boundaries thereof but says that because the survey by reason of an exception therein is repugnant in its terms a part of the grant fails, and that thereupon the United States took title, to a part of the original grant which was subsequently conveyed, to him. The claims of plaintiff and defendand to "Mormon Island" have a common root in the Mexican grant. This being so it is the duty of the court hearing the case in ejectment to discover

and decide who has the better right to the premises.

"Both parties holding under patents have a standing in a court of law, and the court is thus compelled to look beyond the patents to the original source of title and to the character of that title as it existed under the former government."

(Henshaw vs. Bissell, 18 Wall., 264.)

It is not pretended that the government owned this land originally. Whatever title any one has was derived from another government. Ib. 264.

The plaintiff shows that in a suit between the grantees under the Mexcian government and United States. the grant claimed by plaintiff; was judicially confirmed to the predecessors in right of the plaintiff and the boundaries thereof were definitely fixed by the District Court of the United States. This judicial proceeding is unquestioned; has never been impaired or modified. The decree of the District Court, fixing and confirming the boundaries of the grant, was appealed from to the Supreme Court of the United States and finally dismissed the Government under a stipulation "that the claimants might proceed upon said decree of confirmation as on final decree." (Record bottom page 8). This decree leaves no germ or sediment of title, in the United States.

The next step in the execution of the decree and of the laws of the United States in respect of said title, was the survey. The Surveyer General's duty, under the decree, was plain. The decree was the foundation of the validity of the grant and of the proceedings in the survey and location of the land confirmed—"*Survey must conform to the decree.*" (The Fossatt case, 2nd Wall., 714.)

The decree must be *exactly observed*. Ib.714.

Neither the survey, nor defects in it, create, give or withold title. The title comes from the grant. Russell vs. Maxwell Land Grant Co., 158 U. S., 259. The survey difines boundaries, nothing more. Ibid. Where the lines really are, is a question of fact open to the court in ejectment. Ibid, 259.

In the case at bar, there is no dispute of fact. The exterior boundaries of the grant are proved and conceded to include "Mormon Island." Hayes vs. Steiger, 156 U. S., 389.

The grant was complete under the Mexican Government. The laws of the United States were designed to identify the land granted. This was their sole object. They must be construed in the light of that object and to facilitate it, and not in hostility to the grantee.

> Chandler vs. Calumet Co., 149 U. S., 91-2.
> Frusher vs. O'Connor, 115 U. S., 102.

The Government had no jurisdiction under the treaty and its laws to impede the acquisition of the documentary evidence necessary to complete title in the grantee.

> 149 U. S., 91-2.
> United States vs. Halleck, 1 Wall., 439.
> United States vs. Billings, 2 Wall., 444.
> Hujueras vs. United States, 5 Wall., 827.

In the Maxwell Land Grant case the attempt was made to contradict a law of Congress in order to locate the exterior boundaries of the grant. Here the exterior boundaries are agreed upon. There is no attempt to dispute said boundaries in this case. The question here

is, the exterior boundaries having been judicially found and identified by the survey, had the Surveyor-General jurisdiction to reserve a part of the grant and vest title to the part reserved in the United States?

Defendants claim that the survey having been made with the exception therein, and having been, as so made, approved by the Land Department of the Government, the survey and patent alluding to it become and are the title and that the decree is lost sight of.

This proposition is not sound. The Land Department had neither original nor appellate jurisdiction to fix the boundaries to a Mexican grant. Nor had the Surveyor General any such jurisdiction. From the time the proceedings were brought into court, to fix the boundaries, until the survey was completed and a patent issued, the jurisdiction of the court continued over the matter. The Land Depertment was acting in execution of the decree. The Surveyor-General and the Land Department were the means provided by law for the execution of the decree. The means were subject to the control of the court and not of the Land Department. This is explicitly declared in the Fossatt case, 2nd Wall., p. 712, wherein this court say: (same case, 21 Howard, 445).

"The fundamental error in the argument is, in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court and as much within its competency, as the hearing of the cause and the rendi-

tion of its judgment; as much so as the execution of any other judgment or decree rendered by the court.

"This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction, as may be seen by the cases referred to in the opinion of the court in this case, when last before us, and in many others to be found in the reports. The powers of the Surveyor-General under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way effect his powers. They remained the same as before."

The decree of confirmation of a Mexican grant is th- sovereign muniment of title. All that is done after tha is in execution of the decree in its exact terms, subjec to the power of the court rendering the decree andject to the Land Department. (Ibid.) United Statesee. Hancock, 133 U. S., 196.

Point 3.

But notwithstanding the fact that there is in the survey the exception mentioned, which is carried forward into the patent, yet the decree fixing the boundaries of the grant is also carried forward into the patent, being called for by the survey. By looking at the whole patent, the truth appears. Where contradictions arise in a record, but yet the truth appears from the whole record, notwithstanding the contradictions the court will enforce the truth.

The boundaries of the grant were clearly established by the decree of confirmation. The survey (omitting for the time being the exception) clearly authenticated those boundaries, this appears from the face of the sur-

vey and patent. The object of a court is to reach the truth. Can it be that when the truth appears it cannot be accepted because the action is ejectment?

The patent, on page 22 of record, says: "And whereas the Board of Land Commissioners aforesaid on the 17th day of October, 1854, rendered a decision that the claim of the petitioners is valid, and it is therefore decreed that the same be confirmed to them to hold and possess the same as tenants in common in the respective shares, &c., &c. And whereas it further appears from a certified townscript, on file in the Land office, that the Attorney General of the United States having given notice that appeal of the Supreme Court would not be prosecuted, &c., &c.," and on page 23, the surveyor says: "I have caused the said tract to be surveyed in conformity to the boundaries specified in the confirmatory decree."

This being the state of the record on its face, and the exterior boundaries being proved also, by testimony unquestioned, the law ignores the unlawful recital or exception of the surveyor. There being jurisdiction in the surveyor to identify the boundaries of the grant, which he did, and there being no jurisdiction in the surveyor to make the exception or to withhold a part of the grant, the legal value of the document called the survey ends where the jurisdiction of the officer making it ends. Where a document is partly valid and partly void, the valid part will be sustained and the void part rejected, if the two are separable.

Vanfleet's Collateral Attack, 740, 745.
Com. vs. Weiher, 3 Metc., 445.

The document or survey is void to the extent that jurisdiction of the officer making it is exceeded. (Ibid).

United States vs. Iron Silver Mining Co., 128 U. S., 680.

Boyd vs. Beachbottom, 90 Penn. State, 169.

Thompson on Corporations, 1308, note 1.

Court in ejectment will construe a deed arising out of a statute.

Bigelow on Estoppel, 351; 5 Ed.

A void recital in a municipal bond will be disregarded where it relates to legislative authority to act. to

Northern Bank vs. Porter Township, 110 U. S., 615-17. ject tee.

The power or jurisdiction of an officer to do an is always in issue when the acts of an officer are u review. (Ibid).

All parties are bound to know the law. No one is estopped to set it up. Recital not authorized is void.

Dixon County vs. Field, 111 U. S., 92. See pages 13-15.

In Cowell vs. Lammers, 21 Fed. Rep., 207, a patent to a railroad company of lands embraced within the congressional grant contained a reservation of 'all mineral lands, should any be found to exist in the tracts described in the foregoing. * * * To have and to hold * * * with the exception aforesaid.' The grant to the company provided 'that all mineral lands shall be excepted from the operations of this act.' Judge Sawyer holds that the action of the officers of the land department in inserting the qualifying words 'should any be found to exist in the tracts described,'

was null and void. He says, 'the exception of mineral lands from the grant in an act of congress is explicit. There is no express authority, no provision at all, requiring or authorizing this exception to be repeated in the patent. If the exception in the patent is not broader in its signification than the statute, it adds nothing and takes nothing from the effect of the statute itself in this respect, or to the effect of the patent issued in pursuance of the statute. If it is broader than the statute, then it is wholly unauthorized by law, and as to the part which goes beyond the statute, is utterly void.' And Mr. Justice Field in Defferback vs. Hawke, 115 U. S., 407, holds that the officers of the land department, being merely agents, had no authority to insert in the patent a reservation excluding from its operation all buildings and improvements upon the land patented as mineral land, not belonging to the claimant, upon the ground that such reservation had no support in any legislation of congress.

"In Smelting Company vs. Kemp, 104 U. S., 636, Mr. Justice Field says: 'Of course when we speak of the conclusive presumption attending a patent for lands, we assume that it was issued in a case where the lands belonged to the United States. * * * If they never were public property or had previously been disposed of, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would have been imperative and void, no matter with what seeming regularity the forms of law may have been observed. In such cases the objection of the patent reaches and goes to the existence of a subject upon which it was competent to act.' And to the same effect is Wright vs. Roseberry, 121 U. S., 519.

The patent grants all there is in the survey. If the survey contains two descriptions of the land granted, the court will uphold the true description; and where *there are repugnant several paragraphs in a deed, the first prevails and the last is rejected.*

"Omitted words may be supplied, repugnant words may be rejected, words may be transposed."

Rule 17, 36 Elphinstone on the interpretation of deeds, page 79.

"Where there are two repugnant clauses in a deed, the first shall be received and the second rejected, unless there is a special reason to the contrary."

Shep. Touch., 88. 36 Elphinstone on interpretation of deeds, rule 20, page 91.

"It is otherwise with wills." (Ibid.)

"Where a party introduces an expression having two meanings, one larger, the other limited, he can not afterwards set up the narrower construction."

36 Elphinstone on Interpretation of deeds page 93, note 30.

"If a thing be granted generally and then comes a vidilicet which destroys the grant, 'tis void."

Cutler vs. Tafts, 3 Pick., 278.

"The last clause gives way to first." Same case p. 277.

"Where ambiguity is on the face of the deed, it must be solved by judicial construction of the instrument itself in connection with other instruments to which it refers and having regard to the state of the title." Same case, 3 Pick. p. 273.

"A conflicting or repugnant proviso is void." 3 Pick., supra, 278.

"In a grant of land and woods, except the woods exception void."

Exception, "It is a rule of construction that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor and are to be construed in favor of the grantee." Elphinstone on Interpretation of deeds, page 95.

The exception in the case at bar has no support. The officer making it had no jurisdiction to make it.

"Exceptions to general conveyances of a right are to be construed in questions of doubt against the party in whose favor they are made."

Jackson vs. Lawrence, 11 John. (N. Y.) 191.
Cocheco Co., vs. Wheeler, 10 N. H., 305.

Where a document incorporates another into its terms that other may be referred to for the truth. In this case the decree and the outlines of the survey tell the truth. (See 3 Pick., supra 273.

Point 4.

But the exception is void for the further reason that the exception has no existence. The exception reserves the lands only which are covered by the navigable waters of the inner bay. There are no navigable waters within the general boundaries of the grant, nor do such waters cover the area excepted, called the inner bay.

The Supreme Court of the State of California so finds, and states (pape 43 of record). The fact is established by the testimony of defendant himself, found on page 11 of record. At low water it (Mormon Island) is not an island. No depth of water is given to help defendant out. He will doubtless claim that the

court will take judicial notice that the water is navigable. The court will not take notice of that which does not exist. "The court will not take judicial notice of the nature and extent of tide lands or mud flats."

Baer vs. Moran Co., 153 U. S., 287.

Point 5.

The questions in this case, may be tried in ejectment, or, in what is called in California, a real action. There the distinctions between law and equity are abolished. Plaintiffs' only remedy is in this case and in this action.

It is well established that even where law and equity systems are distinct, equity is not available to eliminate from a deed a void provision. The exception being void there is no remedy in equity to remove it.

"If the defect appears upon its face and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it can not be said that any cloud whatever is cast on the title." 3 Pom. Eq. Juris., Sec. 1399, note 1. Dows vs. City of Chicago, 11 Wall., 109.

This case was brought under the laws of a state where the distinctions between law and equity are abolished. The defendant has submitted all the equities of the case to the court, and if plaintiff can prevail on these equities he is entitled to judgment.

The court will observe that defendant, by his answer sets up title in himself and prays (page 5 of the record) that all claims be presented and quieted. Where a party in his pleadings raises equities and submits him-

self to such equities in a given case, he will be held to such equities.

Bank of Utica vs. City of Utica, 4 Paige, 399.
Dows vs. City of Chicago, 11 Wall., 110.

In this case case the equities are all for plaintiff. He has the decree and stipulation under it that his grant is valid. Besides the law of July 23, 1866, preserves the equities of the grantee under a Mexican grant. This was held in a case where the boundaries were inaccurate and part of the grant was excluded from the exterior boundaries of the survey.

Hayes vs. Steiger, 156 U. S., 339.

Neither the United States nor a subsequent purchaser can impair these equities.

Knight vs. United States Land Assn., 142 U. S., 188.

Under the treaty, the sovereignty over the documents constituting title passed to this Government, but private rights of property remained the same. (142 U. S. 201). The treaty required the United States to give and not to cloud titles.

Point 6.

The Court erred in finding that the defendant owned the fee simple title to Mormon Island, as stated in finding 9, page 6 of record, and in its conclusion of law, this defendant was the owner in fee. (See page 7 and 64 of record).

Defendant alleged title was a subsequent patent issued by certain officers of the United States. The United States was bound by the decree of confirmation

and the stipulation that said decree was final. (See stipulation, page 21 of record).

The decree bound the United States without further proceedings.

Higneras vs. United States, 5 Wall., 827.

The court rendering the decree had power over the survey. (Ibid). The land department, in the face of that decree, had no power to execute a second patent. This may be shown even in ejectment.

Doolan vs. Carr, 125 U. S., 618-625.

The decree and stipulation is conclusive on the boundaries and on the government.

United States vs. Halleck, 1 Wall., 440.
Higuer vs. United States, 5 Wall., 834.

It is submitted that no case can be found in the books where the boundaries of the decree did not prevail when conceded. The boundaries of the decree are legally visible and are conceded as claimed by the plaintiffs, and are proved without objection, page 10 of Record.

Wherever the survey controls there is uncertainty concerning the boundaries fixed in the decree itself. That uncertainty gives way to, or is held to be settled by a survey which is certain. Here the exterior boundaries of the decree and survey are identical and are so conceded to be. Where, then, can there be doubt? The land department can not approve a survey which seems to throw doubt upon a clear and definite decree and get a benefit out of that doubt. The United States took no interest in the grant. It agreed, by treaty

with Mexico, to perfect grants theretofore made by giving true and definite evidence of the title thereof. No title thereto came to the government, except in cases of abandonment. No part of this grant was abandoned. The United States had no estate in Morman Island to convey to defendant, and hence, defendant took nothing by his patent. The legal and equitable title thereto is in plaintiffs. The government must protect and not assail that title. If the government had no title, it could convey none.

Point 7.

The law in this case must be administered in consonance with the case made. The laws, usages and practice of the government in disposing of its own land and the presumptions of law arising from the different steps taken in such cases is one thing. Legal judicial proceedings to perfect titles to grants of land from Mexico already vested in private owners under another government is quite another thing. The government in such a case can not limit title.

This distinction is recognized by the law and is kept alive by this court. Justice Field, in case of Smelting Co. vs. Kemp, 104 U. S., 641, speaking of the conclusive presumptions of patents, says, of course he is speaking of cases where the government owned the land and had a right to convey it. If they never were public property and no provision for their sale had been made by law, the land department had no jurisdiction.

Where land owned by the government is granted by an act of Congress, such act is the highest muniment of title. Where such land is disposed of through the machinery of the land department, the patent is supreme

because the government is grantor therein and is not bound, nor does private right vest until a patent issues. Hence the patent controls both parties to it. The case of the judicial confirmation of a Mexican grant rests on different considerations. The private property right vested in the grantee under the sovereignty of Mexico. The United States, by treaty, pledged itself to mature the right of the grantee by furnishing him adequate evidence of title under its laws. The government did not take the legal title, but assumed to complete the evidence of title to the grantee. A court was provided, clothed with judicial power to ascertain the validity of the grant and the boundaries thereof. The court in this case did this. This being done, the grant became by the decree of the court, certain and the government bound. See Sec. 15 of act of 1851. The highest muniment of title in such a case is the decree. No one, except the grantee, could, after the decree, get title to any part thereof from the government, as the government had none to give. If a third person subsequently took a patent from the government for any part of the land included within the boundaries of the decree, such patent was either void in his hands or was taken in trust for the grantee. This is so even where inchoate rights vest in goverment land.

Cornelius vs. Kessel, 128 U. S., 460-461.

The treaty required the government to protect all titles; not to make them, but to preserve them.

San Francisco vs. Le Roy, 138, U. S., 656, 670, 672.

Such grants stand on distinct grounds from government sales of its own land. Tide lands, if included in

the grant, go with the grant. (Ibid.)

The duty of the government to give evidence of title sufficient under its laws was a trust obligation as distinguished from a sale of its own property. This trust obligation gave no jurisdiction to the general government to deface the title or to confuse it.

Townsend vs. Greely, 5 Wall., 337.
Knight vs. Land Assn., 142 U. S., 186.

Under the treaty sovereignty passed, but not private rights of property.

142 U. S., 201.

The obligation assumed by the government under the treaty was to give sufficient evidence of title. (Ibid.)

An inchoate right was protected under the treaty.

Newhall vs. Sanger, 92 U. S., 761.
Chandler vs. Calumet & Co., 149 U. S., 91-2.
Fisher vs. O'Connor, 115 U. S., 102.

Where the lines of a grant run on the ground is a question of fact. Russell vs. Maxwell Land Grant Co., 158 U. S., 253.

In the case at bar that fact is shown by parol testimony given without objection, and is also recited in the patent. Oral testimony admitted without objection can not afterwards be struck out or ignored.

Wright vs. Seymoor, 69 Cal., 128.
People vs. Long, 43 Cal., 446.

Point 8.

The government is presumed to be honest. Its documents will be construed to conform to its duty.

> The decree fixed the boundaries of the grant. The survey included all the grant and then attempted to reserve a part of it. The granting part of the patent is broad enough in its language to include the whole grant. If common honesty requires the government to give such a patent, the court will so construe the patent, it being capable of that construction. The defendant has overthrown his own case. He can only retain the land in the inner bay by tracing title thereto through a Mexican grant.

The defendant has shown that what he claims is tide lands. But tide lands once owned by the Federal Government vest in the state when created. The defendant shows no title from the state; claims none. Tide land, when part of Mexican grants, pass to the grantee. There never has been any Mexican grant of these tide lands other than the grant to plaintiff of the Rancho San Pedro. The thread of defendant's alleged title therefore, to the said tide lands reaches back to the Rancho San Pedro. But the whole of that grant was to plaintiffs. The decree confirmed it, thereby binding the government and all outsiders. If defendant has a valid patent to said tide lands (which is denied) that patent rests on the equities of plaintiffs derived from Mexico and confirmed to them by the decree. Such patent is held for the use and benefit of plaintiffs. When defendant pleads title to these tide lands, he pleads plaintiffs' grant, no part of which has he acquired. His rights, if any, are subsequent. He shows himself to be a mere intruder upon plaintiffs' equities, which the government was pledged to preserve to plaintiffs and was powerless to give to defendant. He prays in his cross bill to have all equities settled in this case.

The court, if defendant have color of title wrought out through the misapprehension of government officers acting without jurisdiction; then the decree of the court should be that he convey to plaintiffs.

We claim, however, that his patent conveys nothing, and is void. The government acquired no estate in the Rancho San Pedro and could convey none.

Point 9.

The argument is that notwithstanding all we say about The exterior boundaries of she decree and of the survey being coincident, stlil plaintiffs introduced the paper called the survey in evidence and thereby became bound by its literal terms. It is said that plaintiff can not expel from a paper introduced by himself, an exception against his interest contained in it, but that the paepr, as written, is adopted by him when he relies upon any of it as a part of his evidence.

This position is not sound. When a party introduces a paper into a judicial proceeding, he thereby invokes for it a judicial construction. He offers its judicial meaning only. The jurisdiction of the court over a given controversy, involves the power of interpretation of public and private documents relevantly connected with the case. If the law require certain evidence to be introduced, it does not estop parties effected by it from limiting it to its judicial significance. The law estops no one from a legal interpretation of documents affecting his rights. There is, however, no ground of fact laid in this case for estoppel by the survey. On page 10 of the record, the exterior boundaries of the decree were shown by oral proof without objection; they

are also stated in the survey itself.

If defendant relies upon the exception in the survey and his patent, as a ground of estoppal, he should have objected in the court below to testimony showing the real boundaries of the decree if as he claims they differ with the boundaries of the survey. This he did not do. Estoppel shuts out the truth. When a case turns on estoppel it is because the real truth is excluded from the case. In the case at bar, however, defendant did not object to testimony showing the original boundaries of the grant as defined in the decree, but admitted such evidence without objection. This evidence showed the inaccuracy of the exception.

But the United States got no title by estoppel. Legal titles do not pass that way.

> Gilmer vs. Poindexter, 10 How., 257.
> Estopel is odius. Biglow 5.

Plaintiff claims under the ~~government~~ Grant. The government is bound by the decree. The Government cannot estop plaintiff; estoppel must spring out of the conduct of the party estopped, and not out of a public document whose terms are not controlled by him.

> Henshaw vs. Bissell, 18 Wall., 255.

The the treaty was intended to protect the legal and equitable rights of grantees, and not intruders without right.

> Right's Lessee vs. Rochester, 7 Wheat. 535, note

A party who has contracted to convey, can not bring ejectment. (7 Wheat., 535-40). In this case the decree being against the Government it could not bring

ejectment. (Ibid.) Neither can it convey to defendant a status, which it did not have, to contest plaintiffs' claim. (Ibid.)

The testimony on page 10 of the record disproves the exception in the survey. This evidence shows that the exception violates the decree. This fact being shown without objection, the decree prevails. Defendant can not admit evidence showing the boundaries of the decree, and then ask that such evidence be ignored and an estoppel be set up to neutralize the said evidence. The exception in the survey being shown to be false in fact, it must stand aside for the truth. Whenever a survey and patent contradict the decree (which is not the case here) the patent prevails only where parties seeking the benefit of the contradiction, object to evidence showing the contradiction. If the court shuts out such evidence on the ground of estoppel or other grounds, the patent stands. But if no objection is made to evidence showing the correctness of the decree and the decree is made visible, the court treats it in a Mexican grant case as the sovereign muniment of title to which subsequent documents must conform. They are void to the degree that they do not conform to the decree.

In this case the evidence is all in without objection, showing the full grant of the Rancho San Pedro to plaintiffs. The defendant in his cross action asks (page 5 of record) that the "plaintiffs be adjudged to produce and bring forward any and all claims which they or either of them have or make upon the above described tract or any part thereof, and that the same may, by the decree of this court, be declared invalid and of no effect. * * * and that plaintiffs be en-

joined, &c., and that all such claims be quieted, and that defendant be adjudged to be the owner, &c."

All the limitations against plaintiffs, if any, in an action of ejectment spoken of by the Supreme Court of California, in its last decision, and hereinabove quoted, are expressly waived by defendant, and the equities of the situation are invoked.

The court is possessed of the whole case. Defendant, in his answer does not stand on his patent, but goes behind it and submits the equities. These are all for plaintiffs.

The spirit of the law of June 23, 1886, cherishes plaintiffs' equities. The court should render under the pleadings such judgment as the court below should have rendered, which is for plaintiffs. If defendant's patent gives him color of title (which is denied) the real title is plaintiffs', and should be so decreed. The Government, by the treaty with Mexico, bound itself to give good evidence of title. This obligation rests on all departments of the Government, including this court. This final tribunal is appealed to by defendant in his cross action to find and declare the superior equities in the case. This court, in doing so, should carry out the treaty obligations of the Government, and if a ministerial officer of the Government has made a mistake against plaintiffs' rights, that mistake should be swept out of the case by this court. This court holds in the case of the Maxwell Land Grant, 158 U. S., 259, that a bill in equity will lie to correct an erroneous survey. There is no distinction between law and equity in California. The fiction of ejectment is annulled, 3 Wall., 493.

Defendant in this action prays that the title to Ran-

cho San Pedro be quieted, so that equity jurisdiction is present in this very action, and the equities of plaintiffs, if the decree and survey differ, or if the exception be void may prevail.

Point 10.

It is submitted that the defendant, under the facts of this case, is an intruder upon the estate of plaintiffs, and as such has no status to contest with plaintiffs the strength or clearness of plaintiffs' title.

The land claimed by defendant is the land described in the exception in the survey, out of a body of land constituting the whole body of the tract surveyed. This exception invincibly implies that the body of land excepted lies within a larger body first found by the surveyor to exist; otherwise it could not be taken out of it. The larger body which the surveyor was officially in search of was the Rancho San Pedro. The Rancho San Pedro was granted in its entirety by Mexico to plaintiffs. In order to show the extent of the exception defendant is driven to show and concede the larger body, out of which the exception is taken. That larger body is shown by the evidence introduced without objection, to have been confirmed by judicial decree to plaintiffs as the Rancho San Pedro. This decree, the government is in honor bound to execute. The exception is shown, also to be mostly tide land which could only be acquired by an individual through a Mexican grant or from the state. Thus the situation unfolds the exception as a bud of the grant by Mexico of the Rancho San Pedro to plaintiffs. The defendant

by means of a trick in the survey, seeks to pick that bud. He can not get to the exception without crossing the exterior boundaries of the Rancho San Pedro. His so-called title to the exception begins in the survey. But this court has held that a survey can not give or create title. (158 U. S., page 259). His patent rests upon the trick in the survey and not upon any estate of the government in the Rancho San Pedro, for it had none. If the survey be shown to be right or wrong, yet the title must have a support beyond the survey. 58 U. S., 259.

The defendant, in setting up title to the exception in which the government had no estate, necessarily affirms the Mexican grant as the whole body of land out of which the attempt was made to pluck the exception. The government never succeeded to any part of this grant. Defendant's position destroys itself.

An intruder has no status in ejectment to contest the title of a Mexican grantee or any other grantee.

Newell on Ejectment, 720, note 1.
Newell on Ejectment, 469-70.
Mayor vs. Carlton, 22 Jones (N. Y.) 555.
Mayor vs. Carlton, 113 N. Y., 284.
Gardner vs. Heart, 1 N. Y., 528.
Miller vs. R. R. Co., 71 N. Y., 380.

Point 11.

The Supreme Court of the State of California, in its second decision in this case, rests its judgment on the California cases therein cited and 3 Wallace, top of page 52 of record.

On a careful examination of these cases, it will appear that in all but one, the grants therein involved were of specific quantities of land lying in larger bodies. The decrees confirmed the grants by quantity. Such quantities could only be ascertained with accuracy without a survey. In one case the decree defined the boundaries obscurely and the survey was accepted as the most certain. In none of them are the questions here presented implicated. Besides, the questions here involved are not State, but are Federal questions. The case cited in 3 Wallace turns upon other considerations. It is, therefore, submitted that the judgment of the court below ohght to be reversed, and a judgment rendered in this court for plaintiffs on the whole case as presented by the pleadings and proof.

Conclusion.

The following propositions must be conceded:

1. That the land claimed by defendant is a part of the Rancho San Pedro as it existed under Mexican laws prior to the treaty, and was surveyed as such, for the exception declares that it is "excepted, reserved and excluded from the tracts as thus surveyed." The excepted part is shown by the courses and distances of the survey of the "inner bay," found on page 36 of record, to be a part of a larger body first surveyed. The survey adopts the transcript of the decree, page 22, and the confirmed boundaries of decree, page 23 of record, and also "area within the *exterior lines of the confirmed tract* 44,219.72 acres. Area *within lines* 7 to 16 being lands covered by the navigable waters of the inner bay of San Pedro connected with the ocean, and *therefore*, to be excluded, 1,100.50 acres. Area

included in the boundaries specified by the confirmatory decree, of bay, 43,119.72." Page 36.

And by the fact that the land excluded is tide land, and the title thereto could only vest in an individual by grant from Mexico or the State, defendant claims nothing from the State.

2. The reason for excluding the excepted part is not because it was not a part of the original grant of the Rancho San Pedro by Mexico to plaintiffs, but because it was alleged to be covered by the navigable waters of the inner bay of San Pedro and connected with the ocean, and as the surveyor says, (page 36 of record) is "*therefore*," to be excluded. This reason for the exception is illegal as shown by the cases herein cited. Tide lands, if part of a grant, go with it.

3. The United States has never been technical in exposing and settling titles to Mexican grants. It has fulfilled the full measure of its obligation under the treaty to such grantees. The Statute of June 23, 1866, illustrates the solicitude of the government for the equitable interests even of such grantees. It is there provided that if a part of a grant be left out by a survey, the grantee shall not, therefore, necessarily lose it, but his equity is preferred by the Statute. (See 156 U. S. 389, supra.)

4. Though defendant break down the survey, or limit it to the body of land remaining after the excepted part is withdrawn therefrom, yet he has established no title in himself. A title to a part of a Mexican grant can not originate in a survey.

158 U. S., 259, supra.

5. Under section 15 of the law of 1851, the decree of

confirmation is in terms made conclusive against the government and subsequent purchasers, on two propositions, *first*, that the boundaries, if therein declared, are the true boundaries; and *second*, that the grant is valid as therein defined.

6. If the United States is bound by the decree it had no estate in a grant so confirmed, and could convey none.

7. That the granting or habendum clause of the patent is broad enough in terms to include the larger body of land described in the survey and constituting the Rancho San Pedro undefaced by the exception.

8. Mexico, by making the original grant of the Rancho San Pedro, parted with all the interest therein of that government. The United States took no estate therein fram Mexico under the treaty, but succeeded merely to the power of the Mexican Government to furnish forth to the grantee sufficient legal evidence of title to said grant under the laws of this country. One executing a power without an interest can not so pervert the power as to acquire an interest nor grant one in defiance of the power. The public documents executed by the Government in performance of its duty under the treaty to the grantee should have, if capable thereof, a construction filling the full measure of that duty.

JEFFERSON CHANDLER,
Att'y for Appellant, or Plaintiff in Error.

Clerk Supreme Court, U. S.
FILED
1897
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the U. S.

October Term thereof, 1896.

ANA J. DOMINGUEZ DEGUYER,
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Additional Brief and Argument of JEFFERSON CHANDLER, for Plaintiffs in Error.

The facts of this case are stated in the original Brief. They are, however, condensed as follows:

Plaintiffs in error sued defendant in ejectment, under the laws of California, or rather, brought a civil suit for possession of real property. The defendant in error denied title in plaintiffs, and set up title in themselves, and asked affirmative equitable relief, praying the court to quiet the title. The contention grows out of the following state of facts: Plaintiffs below claim the land within metes and bounds as a part of the Mexican grant, described by monuments. The grant was confirmed under

special statute, approved March 3d, 1851, applicable to California alone. The exterior lines of the grant were fixed by the decree of the Court, and a survey was had, the exterior lines of which agree with the decree. The surveyor, after completing the survey, found that some of the grant was what he conceived to be tide lands. Assuming that these tide lands did not go with the grant as a matter of law, he made a separate survey of them, and incorporated it into his general survey and attempted to except it from the grant, though lying within the exterior boundaries thereof. The principal question here is, had the surveyor power to decide the law of the case as a part of his official duty as surveyor? Appellants contend that he had no such power.

Point 1.

It will be kept in mind by this court that the statute under which the surveyor acted is a special one, applicable to California alone. It will also be remembered that the boundaries of the grant were found and declared by a judicial decree of the United States Court, sitting in California, having jurisdiction thereof. Appellants contend that the decision of the court under this special statute was binding on the United States and all its officers, as this court has repeatedly held. These cases were all reviewed by Judge Sawyer, in the United States against Southern Pacific R. R. Co., reported in 45 Federal Reporter, p. 609–612. These decisions are

referred to in the original Brief, with the exception of the decision in 45 Federal Reporter, just cited, and are reviewed in said last named case by one of the ablest judges on the Federal Bench, whose experience gave to his adjudications great authority. He holds that the decree governs the surveyor, and not the surveyor the decree.

Point 2.

The decision of the Court confirming the grant cut off all possibility of title in the United States.

Brown vs. Covilland, 6 Cal., 566–574.
Hartley vs. Brown, 46 Cal., 201.
Clark vs. Lockwood, 21 Cal., 230.
Ward vs. Mulford, 32 Cal., 365.
United Land Association vs. Knight, 85 Cal., 466.
Foss vs. Hinkley, 91 Cal., 194.

The decision was against the United States as a party to the proceeding. The United States had no original interest in the grant. It was never a part of the public land of the country. The legal title thereof was not even vested in the United States as trustee. The title to the property had passed to the grantee prior to the authority of the United States over the same. The United States succeeded to the political sovereignty of the government of Mexico, in respect of evidence of title merely. The grantee was required under the treaty, to secure proper evidence

of title from the United States, instead of from the retiring government of Mexico, the original grantor. The government of the United States could not, therefore, acquire any hostile interest to the grantee under the treaty, or under the decisions.

Point 3.

The patent issued to the defendant below, by the officers of the government of the United States, and received in evidence, is void in an action of law for want of authority to execute it.

Wright vs. Rosebery, 121 U. S., 519–20.
Smelting Company vs. Kemp, 104 U. S., 636.
Doolan vs. Carr, 125 U. S., 618.
United Land Association vs. Knight, 85 Cal., 460.

The Court's finding that defendant owned the land was void.

Point 4.

As shown in the former Brief, the defendant below was a trespasser, and as shown by the authorities cited in the former Brief, could not contest with appellants the title, or the validity thereof. This principle is settled in California and elsewhere. A mere intruder upon land cannot put in issue the title of the real owner.

Point 5.

In this case defendant below appealed to a Court of Equity, under his cross-answer to quiet the title.

In such case the Court will look behind the patents where there are two of them, and dicover the real owner.

Yates vs. Smith, 38 Cal., 65.
Smith vs. Athern, 34 Cal., 506.
United Land Association vs. Knight, 85 Cal., 459.

Point 6.

A patent from the United States is not necessary under the Act of 1851 to maintain ejectment.

Waterman vs. Smith, 13 Cal., 373.
Byrne vs. Alas, 74 Cal., 639.
Moore vs. Wilkenson, 13 Cal., 486.
Reiley vs. Heisch, 18 Cal., 202.
Estrada vs. Murphy, 19 Cal., 270.
Johnson vs. Van Dyke, 20 Cal., 228.
Yates vs. Smith, 38 Cal., 66.
Amesti vs. Castro, 49 Cal., 330.

Point 7.

The right in the Executive Department to survey under the general land laws is not power to disturb boundaries fixed by meets and bounds and a decree.

Yates vs. Smith, 38 Cal., 68.

A survey is simply designed to discover the meets and bounds, and not to evade them.

Point 8.

There is a distinction between proceedings to sell lands that the government owns and proceedings to establish Mexican grants under the law of 1851. In the first case, the government is the owner; in the second case, it exercises its sovereign authority to perfect the title to the owner, which it is under treaty obligations to do. It can neither require title itself, nor facilitate the acquisition of title in any one hostile to the grantee.

United Land Association vs. Knight, 85 Cal., 477–489, and cases cited.

Point 9.

If the defendant got title by his patent to the land in controversy, he holds such title under the equities of this case for plaintiffs below.

Solomon vs. Symonds, 30 Cal., 301.
United Land Association vs. Knight, 85 Cal , 477.

Point 10.

Meets and Bounds, Specific Boundaries Prevail.

Yates vs. Smith, 38 Cal., 65.

Point 11.

The Court will remember that there is no conflict between the exterior boundaries of the grant defined in the decree and the exterior boundaries of the

grant traced in the survey. They are identical. The question here is not one of dispute between the decree and the survey. There is no such dispute. The question involved is, had the surveyor power after ascertaining the true boundaries of the grant by his survey, to make a subordinate survey within the exterior lines of the grant and the main survey, and withhold the part included in the subordinate survey, because in the opinion of the surveyor said subordinate part did not pass as a matter of law with the grant? They will remember that neither the Courts of California, nor this Court, had at that time determined whether tide lands, being a part of the Mexican grant, passed with the grant? The surveyor assumed that it did not, and therefore attempted to withhold it. In this he was mistaken in the law of the case, and his mistake cannot be the source of title in the United States, nor can the United States avail itself of the mistake of its own officer to acquire part of a grant already decreed in a proceeding against the United States to be the property of another. The duty of the government was to perfect and not to cloud the title of the grantee. Its sovereignty was pledged to this. There is no principle of law which permits the government to enrich itself by a violation of duty, or a mistake of duty of one of its officers.

Point 12.

This is practically an agreed case. No objection to the evidence was taken, nor was any exception

made thereto by the appelles. The decree showing the meets and bounds, and possession of the grant, was put in evidence without objection. Defendant below cannot raise the question here of a conflict between the decree and the survey, for two reasons. First, none exists; second, objection should have been made to the decree below if it conflicts with the survey. The Court will not go out of its way to decide a point for defendant, not raised by him. The decisions cited by the learned counsel for defendant, discussing differences between surveys and grants, therefore, have no application to this case, inasmuch as no foundation was laid below for any such contention here. On completion of the survey fixing the exterior boundaries of the grant, as fixed in the decree, the jurisdiction of the surveyor was at an end. All subsequent proceedings by him were unauthorized by law. He had no judicial power whatever. His conception of the law was immaterial, hence the exception in the survey and in the grant is void. If there were a conflict, however, between the exception in the patent, and a lack of it in the decree, the Court will be governed by the decree; on the principle that where two descriptions of property are made in a conveyance, one correct and the other incorrect, the Court in any action where this fact appears from the face of the papers, will prefer the correct description to the incorrect one.

(A). The defendant below appeared to the equities of the case in his Cross-Answer, pp. 4 and 5 of

Record. No reply is necessary under the practice of California. Said defendant cannot therefore claim here that the equities cannot be considered because plaintiffs below did not set them up. They need not be pleaded.

Dolan vs. Carr, 125 U. S., 618.

Court will determine legal value of papers introduced in evidence constituting title.

Holland vs. Challen, 110 U. S., 25.

(B). There are floating grants which in their nature require a survey before they can be known. There are also grants of ~~equity~~ quantity within larger boundaries which also require survey before the grant is defined. There are grants by courses and distances, which are made certain by a survey. A survey is necessary where the government sells its own land. Where, however, the grant is from Mexico by monuments, as in this case, the survey cannot change such monuments. In such a case, the decree itself is adequate against an intruder. *Riley* vs. *Heisch*, 18 Cal., 202, the Court say: "It is of no consequence, therefore, whether the title which it created be deemed a legal or an equitable one; for carrying with it the right of possession, it is sufficient to support ejectment." There can be no doubt that the original decree contained Mormon Island within the meets and bounds therein found.

P. 34 of Record contains the exceptions in the survey which is, "excepting, reserving and excluding from the tracts as thus surveyed, that portion thereof;" the tracts thus surveyed was the grant, and from that grant a certain *portion* thereof was exempted and reserved. Exemption and reservation from a tract necessarily implied an affirmation that the tract from which a certain portion was taken existed, and it seems almost idle to argue this point further. Moreover, the map filed with the transcript, p. 42 and 43 of Record, contains at the bottom thereof this note, "area within the exterior lines of the confirmed tract, Forty-four Thousand, Two Hundred and Nineteen acres; within the lines therein given, including the excepted part, Eleven Hundred acres, (although there are only Eighteen acres in controversy in this suit, not covered at any time by water) covered with the inner bay, and therefore to be included." This note affirms the entire grant, and speaks of it as a confirmed tract. It then takes out of the confirmed tract, and excludes it, because the note says, "it is covered with the waters of inner bay, and is therefore to be excluded;" not because it is not in the grant itself, but because it is partly covered with water. The part in controversy is not covered with water. Opinion of executive officer not binding on Courts.

McGarrahan vs. Wing Co., 49 Cal., 335.

(C). "The incipient rights of the grantee may be sought out, defined and sustained, in a suit in

ejectment, growing out of a patent for land." Doolan vs. Carr, 125 U. S., 626. "Where an officer had no authority to issue the patent, his act was necessarily examinable at law. Where a Court has jurisdiction, it has a right to decide every question which occurs, and if an officer acts without authority, his act is void." P. 627. "The issuing of a patent was a ministerial act, which must be performed according to law." P. 628. May show that the land patented was reserved, and not liable to a patent. P 629.

(D). "A Mexican claim is not public land, within the meaning of the Acts of Congress."

Doolan vs. Carr, 125 U. S., 630.
Newhall vs. Sanger, 92 U. S., 761.

(E). "A doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law, as well as in a suit in equity."

Wright vs. Roseberry, 121 U. S., 519.
Smelting Co. vs. Kemp, 104 U. S., 636.

(F). The question involved here is the legal effect of the action of a Federal officer in surveying

a Mexican grant, and after so surveying it, reserving a part thereof because of certain convictions of law which he has, relating thereto. This is ceartainly a Federal question. The United States is the proper authority, through its Courts, to define the limits of power of its own officers; over such a case the Circuit Court of United States has jurisdiction, irrespective of citizenship of the parties.

Doolan vs. Carr, 125 U. S., 618.
49 Cal., 335.

Defendants claim title through a patent from the United States; the *validity* of that patent is the question here involved. This gives jurisdiction to the Federal Courts. 620 Id.

(G). The appellants prior possession of the land in controversy is stated on p. 17 of Record. The petition of appellants for confirmation of the grant was introduced in evidence without objection, where it is said that the lines and boundaries of the tracts have always been well-known, defined and respected, That their ancestors received possession of the tracts under the Mexican government. This petition was signed in 1852, and contain on p. 18 the statement, they claim the land by virtue of the grant, and their long pacific possession. There being no evidence that they ever surrendered their possession down to the date of the trial, it is presumed to continue except so far as defendant below ousted them, which he says on p. 11 was brought about in the following

way: p. 18 of Record, "by my buying out the party who was then on it. I paid him to get off, and then I went on. At the time I went on, I claimed that the title to it was in the government of the United States until I obtained the patent for it, then I claimed to own it." A very small portion of the island is above high water mark. It is this island which is alone in dispute in this case, and not the lands covered by any water. Possession once lawfully had, is presumed to continue. The person who was bought off by defendant below, was doubtless the tenant of plaintiff.

We insist, in closing this Brief, that inasmuch as the defendant below admits in his testimony that he was an intruder on the land in controversy, juridical possession of which was given to plaintiffs below, forty years previous, as a part of plaintiff's land grant, he has no status to contest with appellants the sufficiency of appellants' title. All of which we respectfully submit.

JEFFERSON CHANDLER,
Attorney for Plaintiff in Error.

167-723

JAMES H. McKENNEY,
CLERK.

167-723

Supreme Court of the United States.

OCTOBER TERM, 1895.

Ana J. Dominguez de Guyer et al.,
Plaintiffs in Error,
vs.
William Banning.

No. 24

BRIEF OF DEFENDANT IN ERROR.

STEPHEN M. WHITE,
Attorney for Defendant.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ANA J DOMINGUEZ DE GUYER *et al.*,
Plaintiffs in Error,

vs.

WILLIAM BANNING.

No. 175.

BRIEF OF DEFENDANTS IN ERROR.

Statement.

This suit was instituted May 17, 1886, for the purpose of ejecting the defendant from Mormon Island, a small tract of land situated in Los Angeles County, California. Issue was joined upon complaint and answer, and defendant, as he had a right to do under section 442 of the Code of Civil Procedure of California, filed a cross complaint, asking that he be adjudged the owner of the same premises and his title thereto quieted. (Tr., fols. 6–8.)

On January 13, 1888, findings of fact were filed in favor of defendant. (Tr., fols. 9–11.) Judgment was rendered accordingly. (Tr., fols. 12–13.) A motion for a new trial was made by plaintiffs upon what is known in California practice as "a statement of the case." (Code Civil Procedure, sec. 659, Subd. 3.) This motion

was denied January 4, 1889. (Tr., fol. 68.) The case was appealed to the Supreme Court of California, and a judgment of reversal was rendered December 12, 1890. (Tr., fols. 74, *et seq.*) A rehearing was granted, and on September 26, 1891, the judgment of the lower court was affirmed. (Tr., fols 77, *et seq.*; 91 Cal., 400.) Thereupon plaintiffs sued out a writ of error. (Tr., fols. 79, *et seq.*)

The plaintiffs' case is based upon a duly confirmed and patented grant for the San Pedro Rancho. The patent is set forth at length in the Record. (Tr., p. 21, fol. 37.) There is no question as to the validity of this grant. The plaintiffs also introduced in evidence the petition of the claimants for the confirmation of the San Pedro Rancho and the decree of confirmation of the Board of Land Commissioners and of the United States District Court. It was stipulated that plaintiffs held the title of the original grantee of the San Pedro Rancho. (Tr., fol. 15.) There was some oral evidence, but no material issue arises with reference to it.

The San Pedro patent describes the ranch lands in accordance with a survey made by the United States Surveyor General after the confirmation of the grant. The patent refers to the survey and plat for purposes of description. The survey recites that it was made conformably to the decree, and, after giving certain named exterior boundaries, it proceeds thus:

"Excepting, reserving, and excluding from the tract "as thus surveyed, that portion thereof covered by the "navigable waters of the inner bay of San Pedro, and "which are included within the following described "lines, to wit:"—the lines thus referred to being those which mark the exterior boundaries of the inner bay of San Pedro, as shown upon the diagram. (Tr., page 73.)

The defendant bases his claim upon a United States patent (Tr., p. 36, fol. 66) issued in compliance with the land laws of the Government of the United States, which

patent, it is stipulated, comprises the disputed property. (Tr., fol. 19.)

Plaintiffs contend generally that Mormon Island is a part of the Rancho San Pedro; that if the premises in suit are not within the limits of the ranch patent the same are contained within the description of the decree of confirmation; that the exception above quoted, and which exception, it is contended by defendant, includes Mormon Island, is not found in the decree of confirmation and should be disregarded; and they likewise argue that if the exception clause is upheld it should be construed as not embracing the land claimed by defendant.

Defendant asserts that plaintiffs have no title outside of the patent of the Rancho San Pedro; and he maintains—

1. That the ranch patent is conclusive upon plaintiffs; that while the decree of confirmation does not necessarily include the disputed lands, still, that assuming the contrary to be true, the decree can not be resorted to to impeach the patent description, which is the result of an approved Government survey.

2. That the premises sued for are not within the San Pedro patent, and that therefore the action must fail.

3. That no Federal question is involved; or, if there is any such, at all events, the question as to whether the disputed lands are or are not within the patent of the rancho presents no Federal issue.

The statement in the brief of the plaintiffs in error, on pages 1 and 2, that "plaintiffs claimed under a Mexican "grant within the exterior boundaries of which Mormon "Island, the land in dispute, is situate," is not admitted. The record is conclusive against it.

Plaintiffs in error virtually admit the inaccuracy of their proposition, because upon the same page it is stated

that "the Surveyor General, without any authority of "the decree or of law, as is claimed, at the conclusion of "a complete description of the land surveyed, incor- "porated into or added to the survey the following "language," quoting the exception appearing in the Record at page 34.

It might be well to remark here that the act thus attributed to the Surveyor General is due to the Government of the United States.

The exception noted is as much a part of the description as any other portion of the patent.

Counsel to the contrary notwithstanding, there is not in the patent any exception of lands already granted. The exception is a part of the survey description. *The land granted is the tract from which the "Inner Bay" is excepted. No grant is made until the Inner Bay is eliminated.* (*Tr., fols. 64–5.*) To reject the exception would be to alter directly the survey and description of the premises patented.

While we can not inquire whether the lines of the exterior survey do or do not conform to the decree of confirmation, yet there is certainly nothing on the face of the patent to sustain plaintiffs' contention in that regard, for it is expressly certified that the tract was in fact surveyed in conformity to the boundaries specified in said confirmatory decree, and that the map attached is a true and accurate plat of said tract of land. (Tr., p. 23, fol. 39.) This certificate obviously refers to the whole survey and plat as approved and returned. To leave out any part of it would be to entirely change its effect. Indeed, it appears affirmatively that the exterior lines of the survey do not conform to the decree, and that in fact no survey could be made to conform exactly to it. From the Goleta the call is: "Following the sea coast easterly." (Tr., p. 20, fol. 34.) And by reference to the plat of the harbor it will be seen that an easterly course

from that point must cross the mouth of the harbor, now some 14 feet deep, as shown by the United States charts, and nearly a quarter of a mile in width (Tr., p. 27, fol. 47); while a line "following the sea coast," though its general direction would be easterly, would in some parts depart from an easterly course. That the term "sea coast" refers to the inner as well as the outer bay is obvious.

Abbott's Law Dic., "Sea."

The point Goleta is on the inner bay, but is expressly referred to as on the sea coast. (Tr., fol. 34, *supra.*)

Law of the Case.

I.

The San Pedro Ranch patent is conclusive as against collateral attack, not only with respect to the Government, but also with reference to the grantee, and is indisputably presumed to correctly describe the property granted to the patentee, and can not, therefore, be affected by the decree of confirmation.

When the first opinion in this matter was rendered by the California Supreme Court that tribunal had just made a departure in Knight *v.* The United Land Association (85 Cal., 448–474) from established principles. That judgment was reversed here (142 U. S., 161).

The rehearing below in this cause followed a change in the constitution of the court, and, after argument, the *nisi prius* judgment was unanimously affirmed (91 Cal., 400). The final decision, as far as the State court is concerned, and upon which this writ of error was sued out, is referred to by Mr. Justice Field in his concurring

opinion in the Knight case as stating "the true doctrine as to the effect of patents in actions at law" (142 U. S., 215).

In Beard *v.* Federy (3 Wall., 478–492) it was said, in speaking of a patent issued upon a Mexican grant:

"By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now so as to embrace the premises as they are surveyed and described.* As against the Government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent."

See, as supporting this view and as applicable to that suit—

West *v.* Cochran, 17 How., 403;
U. S. *v.* Sepulveda, 1 Wall., 104;
Foster *v.* Mora, 98 U. S., 425;
Smelting Co. *v.* Kemp, 104 *id.*, 640;
More *v.* Steinbach, 127 *id.*, 70;
Cragin *v.* Powell, 128 *id.*, 691;
Knight *v.* The United Land Assn., 142 *id.*, 161;
Chandler *v.* Calumet & H. M. Co., 149 *id.*, 79;
Barden *v.* N. P. R. Co., 154 *id.*, 288;
Lake Superior Ship Canal R. I. Co. *v.* Cunningham, 155 *id.*, 354;
Stoneroad *v.* Stoneroad, 158 *id.*, 240;
Russell *v.* The Maxwell Land Grant Co., *id.*, 253;
McCormick *v.* Hayes, 159 *id.*, 332;
Manning *v.* San Jacinto Tin Co., 7 Saw., 418, 9 Fed. Rep., 729;
Mora *v.* Nunez, 10 Fed. Rep., 640;
Houston *v.* San Francisco, 47 *id.*, 340;
U. S. *v.* San Jacinto Tin Co., 10 Saw., 639.

The decisions of the Supreme Court of California, with the exception of the Knight case (reported 85 Cal., 448), which was reversed here (142 U. S., 161), have been uniformly in the same direction.

Waterman *v.* Smith, 13 Cal., 373;
Moore *v.* Wilkinson, *id.*, 478;
Stark *v.* Barnett, 15 *id.*, 363;
Doll *v.* Meador, 16 *id.*, 324;
Teschemacher *v.* Thompson, 18 *id.*, 11;
Leese *v.* Clark, *id.*, 535; 20 *id.*, 423;
Ward *v.* Mulford, 32 *id.*, 365;
Durfee *v.* Plaisted, 38 *id.*, 80;
Chipley *v.* Farris, 45 *id.*, 539;
Cassidy *v.* Carr, 48 *id.*, 339;
Cruz *v.* Martinez, 53 *id.*, 239;
Thompson *v.* Doaksum, 68 *id.*, 597;
People *v.* San Francisco, 75 *id.*, 389;
Adair *v.* White, 85 *id.*, 313;
Valentine *v.* Sloss, 103 *id.*, 220;
Irvine *v.* Tarbat, 105 *id.*, 243;
Dreyfus *v.* Badger, 41 Pac. Rep., 280.

II.

It is manifest from perusing the brief of the learned counsel for plaintiffs in error that he appreciates the difficulties to be met in the light of the oft-repeated adjudications of this court, to which we have adverted.

(*a*) On page 3, under heading "Point 1," it is said:

"1. The decree of confirmation defined the exterior boundaries of the grant.

"2. The exterior boundaries of the grant are also fixed by the survey and are identical with the exterior boundaries fixed by the decree.

"3. The land in dispute, 'Mormon Island,' lies wholly within the exterior boundaries so fixed by the decree and survey."

If the contentions of the plaintiffs in error thus laid down are supported by the testimony the judgment must be affirmed for want of jurisdiction, as in that event there can be no Federal question for the consideration of the court.

If it should be true that the disputed land is within the boundaries of the Mexican grant, both as shown by the survey and as disclosed by the decree of confirmation, then the subject is confined to a very narrow sphere, and no statute of the United States is drawn in question and no constitutional or treaty provision is involved.

Phillips *v.* Mound City L. & W. Ass'n., 124 U. S., 605.

California Powder Works *v.* Davis, 151 *id.*, 389.

But the plaintiffs' statement as above quoted is entirely unfounded.

It will not be disputed that the patent description and map accompanying the same, and which, under elementary principles, is a part thereof, contains the exception already adverted to; nor will it be controverted that the disputed premises are not contained within any of the lots designated upon the plats of the public survey by the several numbers appearing in the patent (Tr., fol 64).

On pages 4, 5, 6 of brief of plaintiffs in error there is an attempt to show that the original decree is incorporated in the patent, and that the exception mentioned must be excluded upon the theory that the decree of confirmation fixes the grant. But this is the very proposition that was so fully considered and so positively decided in the Knight case, alluded to *supra*. An examination of the opinion of the Supreme Court of California

in that case, in connection with the decision here, is most satisfactory.

While the decree of confirmation defined in a general way the exterior boundaries of the grant, the patent made that description certain.

The patent does not grant the "Inner Bay" and then except it. *The patent grants only the tract from which the "Inner Bay" is excepted.* (Tr., fols. 64, 65.)

The extract from Beard *v.* Federy (3 Wall., 492), quoted *supra*, is conclusive. Nothing can be more specific and direct.

(*b*) "Point 2" of brief of plaintiffs in error, pages 6 *et seq.*, is but a repetition.

While it is true, as a matter of law, that the exterior boundaries of the grant are also fixed by the survey, and are identical with the exterior boundaries fixed by the decree, the accuracy of the proposition rests upon the indisputable legal conclusion that the boundaries as settled by the patent can not be impeached because of assumed non-compliance with the decree.

Henshaw *v.* Bissell (18 Wall., 264) seems to be cited for the purpose of showing that as both parties claim under patents, therefore this court can investigate somewhat further than it could go if but one patent were involved.

But Henshaw *v.* Bissell presented a controversy between two claimants under Mexican grants.

Counsel also cites the Fossatt case (2 Wall., 714), to the effect that the survey must conform to the decree. This is true enough, but the answer to the proposition is that this survey does conform to the decree, and the evidence that it does so conform is found in the incontrovertible fact that the patent so states, and the patent passes precisely the land assumed to be patented and none other. The Fossatt case involved the consideration of exceptions

on appeal. There was no intimation there that a patent could be attacked collaterally. The granting clause here is:

"Now, know ye, that the United States of America, * * * have given and granted * * * the tract of land embraced and described in the foregoing survey." (Tr., fols. 64–5.)

But "the foregoing survey," as shown by the specific description and by the map, excludes the "Inner bay of the San Pedro," and this exclusion is, therefore, presumed absolutely to be in harmony with the decree:

To accept the views suggested by our adversaries would be to hold that the court can revise surveys made by the political department of the Government. This is not allowable.

Cragin *v.* Powell, 128 U. S., 691.

U. S. *v.* Hancock (133 U. S., 196) was a direct attack upon a patent. It was a suit in equity and does not contain an intimation against our position. On the contrary, in order to attack the survey it was there found necessary for the United States to bring a suit in equity.

(*c*) On pages 10–15 (brief of plaintiffs in error) under the heading "Point 3," plaintiffs attempt to show that there is an inconsistency in the patent description, and they manufacture this disagreement by calling attention to the certificate of the Surveyor General, who says that he has caused the tract to be surveyed in conformity to the boundaries specified in the confirmatory decree; then it is assumed that the surveyor's description and the decree conflict, and a number of cases, including Wright *v.* Roseberry (121 U. S., 519), Smelting Co. *v.* Kemp (104 U. S., 636), and Defferback *v.* Hawke (115 U. S., 407), are quoted for the purpose of proving that where an officer makes an exception not authorized by law the same is void.

It is hardly necessary to show the entire absence of similitude between the facts of the cases mentioned and this one. Here the Surveyor General acted within his jurisdiction. It was his business to demark the lands, and it was for the officers having jurisdiction in the premises to determine whether the survey made by him was in fact correct; and the accuracy of this survey is to be determined, not by comparing it with the decree of confirmation or subjecting it to the oral declarations of witnesses, but the approval of such survey, and the issuance of the patent foreclosed further discussion. To say that a patent can be upset because the description contained in it is not in accordance with a decree of confirmation is to expose grants of this kind to innumerable attacks, and to subject them to the varying opinion of different courts as to the meaning of uncertain decrees of confirmation.

See Cragin *v.* Powell, *supra.*

When counsel cited Defferback *v.* Hawke (*supra*), he should also have called attention to the construction given to that opinion by its author, Mr. Justice Field, in Barden *v.* Northern Pacific Railroad Co. (*supra*).

Wright *v.* Roseberry (*supra*), as far as it affects this matter at all, sustains the defendant's propositions.

There are not two descriptions in the patent. There is one description only.

(*d*) On pages 15, 16 (brief of plaintiffs in error) is found plaintiffs' "Point 4," wherein it is contended that the "Inner Bay," so-called, is not navigable, and is therefore not excepted.

It is sufficient to say that the exception as properly construed includes everything within the specific boundaries given, and that the patent does not grant, or purport to grant, anything except lands which are outside

of the description of the inner bay. This appears clearly enough from the last opinion of the Supreme Court of California (Tr., fols. 77 *et seq.*), also from what has been already said, and although we shall later on refer to the matter again, we will now call the court's attention to the plat marked in the Transcript, "p. 73," and to the description at folio 64, showing that none of the lots named covered any part of the tract within the calls and distances of the "Inner Bay," as marked on said diagram, and within which the disputed land is located.

The plaintiffs have brought this action and must make out a case. They can not rely upon any supposed infirmity of defendant's title.

(*e*) Under the heading "Point 5," pages 16, 17 (brief of plaintiffs in error), we are informed that although this is an action of ejectment, that still the power of a court of equity may be invoked, and that some supposed equity of plaintiffs in this case may be asserted.

This position is novel, to say the least.

While the distinctions between law and equity in California are abolished, so that the same court may try cases at law as well as in equity, still the rules of pleading have not been changed so that a suit in ejectment can be turned into an action to reform a patent. (See California cases hereafter cited.) Nor could any such reformation be accomplished by suit between these parties, even if there were any evidence to sustain the theory of the mistake.

After the Federal courts had decided, time without number, that a patent was absolutely conclusive and not subject to be reformed except in a direct suit for that purpose by the United States, a few persons procured the United States to bring suits to set aside patents, etc. Such was the Hancock case already referred to. None of these people have ever prevailed.

Counsel cites Hayes *v.* Steiger (156 U. S., 389). Neither the act of July 23, 1866, or this case, have any bearing at all upon the topic now before this court. The act of 1866 has no relation to such a controversy as that now before us. There was no attempt upon the part of the claimants under the Mexican grant to obtain title to Mormon Island under the act of 1866, and there is not a document or a statement in the whole Record showing anything under which the act of 1866 might be invoked.

Counsel says (page 17, brief of plaintiffs in error):

"Neither the United States nor a subsequent purchaser can impair these equities." (Knight *v.* United States Land Assn., 142 U. S., 188.)

To what equities do plaintiffs refer? No equities are alleged in the complaint; none are disclosed in the testimony. The case cited is absolutely at variance with the deduction drawn from it. When the Supreme Court of California decided this case in the first instance in favor of plaintiffs, that tribunal relied upon the Knight case, but the decision upon which reliance was then placed was afterwards reversed by this court.

The term third persons, as used in the fifteenth section of the act of 1851, does not embrace all persons other than the United States and the claimants, but only those who hold the superior title.

See Knight case (*supra*).

(*f*) Under "Point 6," pages 17–19 (brief of plaintiffs in error), there is nothing new. The theory that a patent is only valid when the decree is uncertain, finds absolutely no support in the authorities. The contrary is clearly established.

Doolan *v.* Carr (125 U. S., 618–625), was relied upon by the unsuccessful litigants in the Knight case; also in the Barden case (*supra*), and has been often explained.

"The holders of a Mexican grant are bound by the governmental survey fixing the extent thereof, although made without notice to them, and although some of them were minors and some were under coveture."

Stoneroad *v.* Stoneroad, 158 U. S., 240.

The same rule was laid down in Russell *v.* The Maxwell Land Grant Co. (158 U. S., 253), where Beard *v.* Federy, and Moore *v.* Steinbach (*supra*), are referred to with approval.

(*g*) On pages 19–21 and pages 22–26, under "Points 7, 8, and 9," plaintiffs claim that the Government can not limit title in cases of Mexican grants, and also that the patent must be construed as conveying something outside of its actual description, and that if the Government is bound by common honesty to give a particular kind of patent or a patent conveying a particular piece of land, then the instrument which was actually given will be so construed, and that although plaintiffs introduce a patent in evidence they are not bound by it.

The cases already referred to are ample to meet everything that is said in this portion of the brief of the learned counsel. Indeed, most of the cases cited by him are adverse to his claims. Several of these have already been considered.

Among the decisions cited (brief, plaintiffs in error, p. 21) is Chandler *v.* Calumet, etc., Co. (149 U. S., 92). It was there held that a patent of the United States regular on its face, can not, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and therefore unfit for cultivation, and hence passed to the State under the Swamp Land Act.

So plaintiffs are endeavoring to do the very thing that the Supreme Court has said, in the case to which they refer, they can not do. This decision also qualifies

Wright *v.* Roseberry to some extent, and maintains the doctrine of Ehrhardt *v.* Hogaboom (115 U. S., 67.)

See, also, McCormick *v.* Hayes, 159 U. S., 332.

Plaintiffs seem to think that they have some title to the inner bay of San Pedro which the defendant is endeavoring to obtain. They forget that their patent is the measure of their title; that it is conclusive upon all parties to it; that it does not include the inner bay; that they never had any interest in the area covered by the tract marked on the diagram, page 73, "Inner Bay;" and they also seem to be oblivious to the plain proposition that the decision of the Land Department denying that they had such right is final.

(*h*) Counsel refers, on page 25 (brief of plaintiffs in error), to the testimony of Hansen on page 10, Transcript. Hansen stated that "Mormon Island is within the exterior boundaries of the decree of confirmation, and "within the exterior boundaries described in said patent. "They are necessarily the same. They are identical."

The witness on cross-examination said that Mormon Island was located in the Inner Bay, and that he had examined the lines of what is called in the patent the "exception," and that Mormon Island is within the lines of such exception, and that it is also within the lines called for in the patent as "Inner Bay." (Tr., fol. 18.) The witness then proceeds to give his legal views upon the subject, which are not of very much importance.

Counsel maintains, as I conceive without authority, that this evidence shows that the exception violates the decree, and he proceeds:

"Whenever a survey and patent contradict the decree (which is not the case here) the patent prevails only where parties seeking the benefit of the contradiction, object to evidence showing the contradiction."

It is needless to remark that no authority has yet been discovered to sustain this proposition. The testimony of a witness as to what is shown by the decree is certainly of no more efficacy than the decree itself, and if the decree and patent are both in evidence, the court will refuse to examine the former, for if a conflict exists it is without the court's jurisdiction in such litigation as this, and the patent must control. There is no more potency in the words of a witness than in the language of an authenticated document.

The inadequacy of parol testimony to overturn the action of the Department appears from the three decisions last cited. Any number of witnesses might make such statements and yet the instrument itself would prevail. Their talk would not even create a conflict. Surely it can not annul a patent record.

When a witness is allowed to give secondary evidence without objection then the adverse party can not assert that there is better evidence, but where the testimony is inadmissible under any condition, its presence with or without objection is unimportant.

Besides, the foundation of my position is that the patent is conclusive. Can Hansen, by swearing to the contents of another paper, destroy the patent's conclusiveness? His efforts when swearing *about* the paper are as abortive as though he had sworn *at* it.

The learned counsel whose brief I have been considering refers to The Maxwell Land Grant Company case, already cited in this brief. I presume counsel desire to attract attention to 121 U. S., 325.

We are informed that as there is no distinction between law and equity in California, there may be an adjustment of the whole controversy in this suit; but that action was brought to reform a patent and was instituted by the United States. The sole authority to bring such a suit is in the Government.

How the absence of a distinction between law and equity in California can result in giving this court jurisdiction to reform a United States patent in an action of ejectment between parties other than the United States, is past finding out.

While a further discussion of this subject seems to be unnecessary, I will, nevertheless, make the following brief references:

The essential and inherent distinction between law and equity as two separate though connected sciences is not abolished.

Smith *v.* Rowe, 4 Cal., 6;
DeWitt *v.* Hayes, 2 Cal., 464.

Each party must allege every fact which he is required to prove and will be precluded from proving any fact not alleged.

Green *v.* Palmer, 15 Cal., 411.

Plaintiff in ejectment can recover only on his legal title.

Buhne *v.* Chism, 48 Cal., 467;
O'Connell *v.* Dougherty, 32 Cal., 458;
Lawrence *v.* Webster, 44 *id.*, 385.

Plaintiff in ejectment must recover on the strength of his own title, and the presence or absence of title in defendants is not material.

Gage *v.* Downey, 94 Cal., 241;
Reay *v.* Butler, 95 Cal., 206.

"The United States is no party to the bill and would not be affected by the decree. Clearly, the United States is the proper party to a suit upon the facts set out in this bill."

Manning *v.* San Jacinto Tin Co., 7 Saw., 427.

The genuineness of the grant and its correct location were the very questions in issue and determined in the proceedings for confirmation and segregation under the acts of Congress, and these questions can not be re-ex-

amined in other tribunals even upon a bill filed by the United States.

Manning *v.* San Jacinto Tin Co., *supra;*
U. S. *v.* Flint, 4 Saw., 74;
U. S. *v.* Throckmorton, 98 U. S., 61.

See, also,

U. S. *v.* White, 17 Fed. Rep., 565.

A patent for a Mexican grant can not be collaterally assailed by private parties, either as to the validity of the grants confirmed or as to their extent and boundaries. If erroneous in any particular they can only be vacated or corrected by the action of the Government in direct proceedings for that purpose.

Houston *v.* City and County of San Francisco, 47 Fed. Rep., 341.

(*i*) On page 27, under "Point 10" (brief of plaintiffs in error), it is said that the defendant is an intruder upon the estate of plaintiffs, and as such intruder has no status to contest. I have already referred to the well-established principle that plaintiffs must make out a case without reference to the weakness of defendant's title. If defendant is an intruder it is because plaintiffs are the proprietors of the property in controversy. That dispute constitutes the sole purpose of this litigation.

Plaintiffs' proposition in this regard may be answered by a similar statement, to wit: If plaintiffs are the owners of Mormon Island they are entitled to recover; but not being such owners they are not entitled to recover.

The assertion that there is any trick in the survey (see brief of plaintiffs in error, p. 28) is wholly unfounded. As a matter of fact the survey accords with the decree. But we do not consider it necessary to enter into a consideration of that question. Counsel seem to forget that the survey referred to in the granting part of

the patent is not merely the survey of the exterior lines; it is the whole survey contained in the patent, consisting of the exterior lines and the lines of the portion of the area therein contained, which is excepted and excluded.

This is not a case of the reservation or exception in a grant. The patent does not grant the lands included in the exterior lines of the survey, reserving or excepting other lands; but it grants only the land described in the whole survey. In other words, the exception is in the survey and not in the grant, and its effect is to exclude from the survey the area contained in the exception, while the grant is for the land thus surveyed without any exception or reservation whatever. The pretense that the patent grants all lands included in the exterior survey excepting or reserving the navigable waters of the bay, and that the actual survey of the bay must be rejected as inconsistent with the general intention, has nothing to support it. The survey was made with the specific and sole object of defining and locating the lands granted and is of superior dignity to the more general expression. It would, as we have intimated, be practically impossible to define by survey the boundaries between the shallow and navigable waters of the bay.

III.

The Exception Contained in the Patent Description Must Be Held to Embrace the Premises in Controversy.

(*a*) The Supreme Court of California so decided, and that decision is conclusive here, because no Federal question can, in any aspect, be involved in this feature of the controversy.

Referring to the final decision of the Supreme Court of California (Tr., p. 53; 91 Cal., 400), it will be seen that that tribunal unanimously determined the exact matter here involved in favor of the defendant in error.

It seems impossible that any real doubt can exist as to our contention that a dispute as to the location of a tract of land presents no Federal issue. The lower court merely adjudged that the patent description of the San Pedro Ranch did not embrace Mormon Island. Surely this presents no subject for Federal cognizance.

In Los Angeles Farming & Milling Co. *v.* Hoff (48 Fed. Rep., 340, 344), it is said :

"The issue as to whether or not the lands in controversy in this suit are embraced by the grant to De Celis as defined in the patent presents no Federal question. It merely involves the location of the boundary lines."

See, also,

New York *v.* Central R. R. Co., of N. J., 12 Wall., 455 ;
Lanfear *v.* Hunley, 4 *id.*, 204 ;
Almonester *v.* Kenton, 9 How., 1 ;
Barbarie *v.* Mobile, *id.*, 451 ;
McDonough *v.* Millandon, 3 How., 693 ;
Kennedy *v.* Hunt, 7 How., 593 ;
Moreland *v.* Page, 20 *id.*, 522.

This court has no power to review the decisions of the State courts upon questions of general law.

U. S. *v.* Thompson, 93 U. S., 586 ;
N. Y. Ins. Co. *v.* Hendren, 92 *id.*, 286 ;
Smith *v.* Adsit, 90 *id.*, 368 ; 23 Wall., 368 ;
Adams Co. *v.* Burlington & Mo. R. R. Co., 112 *id.*, 123 ;
Udell *v.* Davidson, 7 How., 769 ;
Allen *v.* McVeigh, 107 U. S., 433 ;
Boggs *v.* Merced Mining Co., 3 Wall., 304 ;
Hamblin *v.* Western Land Co., 147 U. S., 531 ;
Martin *v.* Thompson, 120 *id.*, 376 ;
California Powder Works *v.* Davis, 151 *id.*, 389 ;
Phillips *v.* Mound City L. & W. Asso., 124 *id.*, 605.

The question of fact as to the true course of a mining lode or vein is not a Federal question.

Bushnell *v.* Crooke Min. & S. Co., 148 U. S., 682.

If we are right in our contention that the first proposition discussed was correctly decided by the State Supreme Court, then the judgment of that court must be affirmed without determining any other question not of a Federal character.

Matthews *v.* Zane, 7 Wheat., 164;
Austin *v.* Boston, 7 Wall., 694;
Murdock *v.* Memphis, 20 *id.*, 590;
Myrick *v.* Thompson, 99 U. S., 291;
Swope *v.* Leffingwell, 105 *id.*, 3.

(*b*) If a Federal question be in fact involved, nevertheless the judgment of the Supreme Court of California must be affirmed, because the land in controversy is clearly included within the exception.

The views of the Supreme Court of California on the final hearing are found in the Transcript, p. 53. We will add a few comments. The exception which we are about to construe is found in the patent (Tr., p. 34, fol. 60), and is as follows: "excepting, reserving and excluding from the tracts as thus surveyed, that portion thereof covered by the navigable waters of the Inner Bay of San Pedro and which are included within the following described lines, to wit." (Here follows a description by courses and distances, Tr., pp. 35, 36.) "Area within the exterior lines of the confirmed tract, 44,219.72 acres; area within lines "7" to "16," being the lands covered by the navigable waters of the inner bay of San Pedro, connected with the ocean and therefore to be excluded, 1100.50 acres; area included in the boundaries specified by the confirmatory decree, exclusive of bay, 43,119.13 acres" (Tr., p. 36, fol. 62). We also find (Tr., p. 37, fol. 64) the following: "Containing, exclusive of the

lands above described as covered by the navigable waters of the inner bay of San Pedro, forty-three thousand one hundred and nineteen acres and thirteen hundredths of an acre, and being designated upon the plat of the public survey as lots numbered thirty-seven, thirty-eight and thirty-nine in township three south, of range twelve west; lot number thirty-seven in township three south, of range thirteen west; lot number thirty-seven in township three south, of range fourteen west; lot number thirty-seven in township four south, of range thirteen west; lot number thirty-seven in township four south, of range fourteen west; lot number thirty-seven in township four south, of range fifteen west; and lot number thirty-seven of township five south, of range thirteen west, of the San Bernardino meridian line."

In order to thoroughly understand these extracts from the patent it will be necessary to consult the diagram attached to the Transcript and marked therein "No. 175. Guyer *et al. v.* Banning," p. 73. This diagram is part of the patent.

The following reasons are ample to demonstrate that Mormon Island is included within the exception:

(1) We first attract the attention of the court to the southern portion of the diagram, and to that part thereof marked "Inner bay of San Pedro exception." Mormon Island is situated within this inner bay, and the specific description appearing upon page 35 of the Transcript describes the exterior lines of the exception as marked upon the diagram. The very language of the description which so accurately designates the exception, and the fact that the exception appears to be absolute and without qualification, upon the map annexed to the patent, afford proof that there was no intention to exclude Mormon Island, notwithstanding the phrase, upon which counsel relies, "covered by the navigable waters of the Inner bay of San Pedro."

(2) On the same map, which, as has already been said, constitutes a part of the patent, we find the following: "Traverse of the Inner bay of San Pedro to be excluded from survey of the claim." This is clear and specific, certainly, and not only fails to indicate the slightest intention to locate the property in controversy within the San Pedro Rancho, but obviously prevents any such construction. The language is unequivocal. In fact, it is mathematically opposed to the position of the plaintiffs in error.

(3) The area to be excluded is 1100.50 acres (Tr., p. 36, fol. 62; see also note on said map.) This area includes Mormon Island. (Tr., fol. 18.) Were Mormon Island deducted, the excluded area would be less than 1100 acres. As to this there can be no controversy, and for the purpose of making the matter more certain, the patent recites that the area included in the boundaries specified by the confirmatory decree, exclusive of bay, is 43,119.13 acres. (Tr., p. 36, fol. 62; see also map.)

(4) In the granting clause of the patent the property granted is described as "the tract of land embraced and "described in the foregoing survey." Now, the foregoing survey is that to which we have just alluded, and that survey excludes the whole of the property, the exterior lines of which are designated by the courses and distances specified. The survey is set out at great length in the patent. In this connection we will merely refer to the course which commences on page 27, fol. 47 of Transcript, and runs to the point called the "Goleta," and the course from the Goleta across the mouth of the Inner Bay of San Pedro to Station 25, and Rattlesnake Island. The court will observe Station 25 on map, not far from the words "La Goleta." The courses and distances which bound the "Inner Bay," as described in

the exception, commence at the intersection of this course with the northern shore of the bay of San Pedro, and run easterly along the northern shore, and southerly and westerly along the easterly and southerly shores of the western point of Rattlesnake Island, and thence with the course of the exterior survey crossing the channel or entrance of the bay to the Goleta.

(5) The final description of all the lands patented (page 37, fol. 64) is conclusive. These lands are described by lots of the public survey, numbered as already cited in the quotation hereinbefore made. There is no land patented that is not so numbered, and none of the lots numbered touch any part of the premises included within the exterior lines of the Inner Bay of San Pedro (exception), and do not consequently include any of the disputed property, all of which is included within Lot 1 of the public survey (Tr., p. 38, fol. 66). This point was particularly alluded to by Judge De Haven, when rendering the opinion of the Supreme Court of California in this case (Tr., p. 53), and none of the propositions to which I have adverted, with reference to these descriptions, seem to have been at all considered by the first opinion given by the Supreme Court of the State of California, and which was afterwards set aside. There Judge Fox relied entirely upon the expression "covered by navigable waters," and he went so far as to remark: "There is no word in the entire certificate of the surveyor to show that all within the survey of the Inner Bay is reserved, but only that part thereof which is covered by the navigable waters." He was evidently unfamiliar with the record.

(6) It is wholly improbable that in the preparation of the patent descriptions words would be used which would make the title of the patentee depend upon the

uncertainties of navigation in a harbor which has long been the subject of Government development. A reference to the reports of the Secretary of War, for years back, will show that this harbor has been considered worthy of extensive improvements, and Senate Ex. Doc., No. 61, 53d Congress, 2d Session, and Senate Doc., No. 18, 54th Congress, 1st Session; prove that the Government is contemplating at this very time the expenditure of some four hundred thousand dollars in the deepening of this inner bay, and that there are now over fourteen feet at mean low water on the bar. The general expression "navigable waters" is most indefinite, and if indefinite it is necessary to make it certain by survey. This has been done, and it is upon such survey finally approved that the defendant confidently relies.

It might be added that when the Government of the United States issued its patent to the defendant for Mormon Island, the Land Department necessarily concluded that the premises so patented were not within the San Pedro Rancho.

IV.

The Judgment Should be Affirmed Because There is no Federal Question in the Record.

On page 2 (brief of plaintiffs in error) it is said that the boundaries of the San Pedro grant include the disputed premises.

On page 3 of the same document we find similar assertions. See same, pages 11, 15, and 25.

It is, therefore, apparent that plaintiffs' counsel relies upon a supposed error committed by the court below in the location of the boundary line. The authorities which have already been noted render it unnecessary to make further citation at this point.

There are no other exceptions calling for consideration.
Ansbro *v.* United States, 159 U. S., 698.

To summarize:

1. If any Federal question is involved such question arises upon an attempt by plaintiffs in error to overturn a patent by the introduction of evidence of a supposed conflict with a decree of confirmation. There is no proof of such conflict. The Record supports the contrary assumption. The patent is conclusive. The recitations of the decree are of no effect whatever as against the description contained in the patent.

2. The patent description does not embrace the premises involved. But if there is any question as to this the judgment must stand because an erroneous decision as to a boundary line presents no Federal question.

3. Upon the exceptions urged by plaintiffs in error in their brief filed herein no Federal question is disclosed.

Respectfully submitted,

STEPHEN M. WHITE,
Attorney for Defendant.

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Supreme Court of the United States.

October Term, A. D. 1896.

A. J. D. DE GUYER *et al.*,
Plaintiffs in Error,
vs.
WILLIAM BANNING,
Defendant in Error.

Error to the Supreme Court of California.

BRIEF IN BEHALF OF THE UNITED STATES.

HOLMES CONRAD,
Solicitor-General.

BYRON S. ADAMS, PR.

Supreme Court of the United States.

October Term, 1896.

A. J. D. DE GUYER *et. al.*,
Plaintiffs in Error,
vs.
WILLIAM BANNING,
Defendant in Error.

BRIEF ON BEHALF OF THE UNITED STATES.

The subject-matter of this litigation is a small island in the Inner Bay of San Pedro, California, having an area at mean high tide of less than one acre; at mean low tide an area of about eighteen acres, called Mormon Island.

As appears by the record, the Inner Bay of San Pedro, is an arm of the sea, in which the tide ebbs and flows, and while the rise and fall is not shown, nor the area of "tide lands," yet by the showing of the map, which is part of the plaintiffs' chain of title, the Inner Bay is "navigable water." The area of the Inner Bay is 1,100.59 acres, including Mormon Island.

In the Inner Bay of San Pedro, and the waters connecting it with the ocean, the Government of the United States has a deep and substantial interest.

Upon this Inner Bay are located the cities of San Pedro and Wilmington, the latter the farthest inside, with their harbors, both having substantial commerce by sea, and the harbor of San Pedro being especially prominent and important as to ocean commerce.

This harbor has not only been regarded by Congress as important because of its actual commerce, but has been and still is regarded as one of the most important points on the Pacific coast in the United States as a harbor of refuge.

It should be stated here that the general scheme of harbor improvements by the General Government at San Pedro includes the outer bay of San Pedro (which is really a part of the Pacific Ocean) and the Inner Bay of San Pedro as well; the so-called "Inner Bay of San Pedro" in this case is (in the official reports to which the attention of the Court will presently be brought) called Wilmington Harbor.

As appears by the map in the record, the entrance to the Inner Bay from the ocean is wholly within the claimed limits of the grant under which plaintiffs claim title; a very large proportion of the Inner Bay necessary for the commerce of San Pedro and Wilmington, as it stands to-day, is within the same claimed limits.

Upon the entrance to this Inner Bay, necessary dredging and work inside, and upon outer works designed to maintain the channel so secured, nearly a million of dollars has already been expended by the General Government.

The improvement was begun as early as 1871, and has been vigorously carried on ever since.

In a report by the Secretary of War to Congress, House Ex. Doc., 41, 2d Sess. 52d Congress, pursuant to 27 St., p. 95, it is said:

> "The existing harbor facilities for the accommodation
> "of this traffic consists of Port Wilmington, the im-
> "proved channel of which has a minimum depth of
> "about fourteen feet at mean low water."

Further describing the Inner Bay of San Pedro, also called Harbor of Wilmington, that report says:

> "The harbor of Wilmington was originally one of
> " the shallow lagoons separated from the ocean by a
> " narrow line of sand beach, which have been men-
> " tioned as characteristic of the shore of San Pedro
> " Bay. In its unimproved condition it was an estuary
> " of about three miles in length, its navigable portion
> " ending at Wilmington, and its lower part expanding
> " into a shallow bay, separated from the ocean by a bar,
> " carrying a depth of about two feet at mean low water.
> " * * * The improvement of this harbor by the
> " General Government has been in progress since 1871.
> " * * * As the result of this improvement there is
> " now a navigable channel into Wilmington harbor,
> " carrying a minimum depth of about fourteen feet at
> " mean low water; and the formation of a depth of
> " sixteen feet is anticipated from the continuance of the
> " work. It is believed to be established that the nat-
> " ural forces will be able practically to maintain this
> " artificial channel."

Harbor lines have been established around the exceptions referred to in the map, page 73.

See Report of Secretary of War, 1895, Vol. II, part I, page 21, 473.

The importance of this harbor, and the necessity of improvement of the Inner Bay of San Pedro, in the judgment of Congress and the executive officers of the Government, is shown by the constant consideration of plans for its improvement and official reports thereon, year by year.

House Ex. Doc., 2d Sess., 53d Cong., Vol. 3.

Report Secretary of War, Vol. 2, 1893.

Report Chief of Engineers, part 1, p. 423; and appendices T. T. 3 and 4, same report; and Vol. 2, part 4, p. 3229, as well.

Report Secretary of War 1895, Vol. 2, part 1, pp. 21 and 473.

Details of these reports are not material; they are referred to as showing the continuing interest of Congress and the proper executive officers in this great work.

A most interesting document, and one containing a map showing the situation completely, can be found in the Report of the Secretary of War last referred to, Vol. II, part V, page 3268, and is printed in Senate Executive Document No. 61, Fifty-third Congress, Third Session. The map accompanying this document shows the inner harbor constituting the exception referred to in the patent, and the report recommends further improvement of the same. This recommendation resulted in the adoption of the project suggested by the War Department.

The estimated cost of this improvement was $392,725.

But later, in the River and Harbor bill, passed June 3, 1896, p. 13, among other things, was enacted the following:

> " For a deep water harbor for commerce and of refuge
> " at Port Los Angeles, in Santa Monica Bay, California,
> " or at San Pedro, in said State, the location of said
> " harbor to be determined by an officer of the Navy, to
> " be detailed by the Secretary of the Navy, an officer
> " of the Coast and Geodetic Survey, to be detailed by
> " the Superintendent of said Survey, and three experi-
> " enced civil engineers, skilled in riparian work, to be
> " appointed by the President, who shall constitute a
> " Board, and who shall personally examine said har-
> " bors, the decision of a majority of which shall be
> " final as to the location of said harbor. It shall be
> " the duty of said Board to make plans, specifications,
> " and estimates for said improvement. Whenever said
> " Board shall have settled the location and made report
> " to the Secretary of War of the same, with said plans,
> " specifications, and estimates, then the Secretary of

"War may make contracts for the completion of the "improvement of the harbor so selected by said Board, "according to the project reported by them, at a cost "not exceeding in the aggregate two million nine hun- "dred thousand dollars, and fifty thousand dollars is "hereby appropriated, so much thereof as may be "necessary to be used for the expenses of the Board and "payment of the civil engineers for their services, the "amount to be determined by the Secretary of War."

Under this provision of law the commission, consisting of Admiral J. G. Walker, Capt. Aug't T. Rodgers, W. H. Burr, Esq., Geo. S. Morison, Esq., and Rich'd P. Morgan, Jr., Esq., was duly appointed, and have made an exhaustive report of their examinations and conclusions to the Secretary of War, under date of March 1, 1897.

This report is not yet printed, but in substance it locates the proposed harbor at San Pedro, and includes in its definition of "San Pedro" the roadstead outside, just east of Point Firmin, and the inner harbor.

"The water area just east of this village (San Pedro) "and separated from San Pedro Bay by Rattlesnake "Island, and the jetties constructed by the Government "is designated on the coast survey charts as San Pedro "Harbor. A shallow, land-locked lagoon inside San "Pedro harbor was designated on the earlier coast sur- "vey charts as San Pedro Bay, but on the more recent "ones is called Wilmington Lagoon. * * *

"In the reports of the Chief of Engineers, United "States Army, the *whole inner basin is generally referred* "*to as Wilmington Harbor.* * * *

"The location at San Pedro must be understood to "mean a location which will include the *entrance* to "the inner San Pedro harbor within its protected area."

The italics are my own; by the map in the record, more clearly by the map on tracing paper enlarged, used in the

argument by counsel, this entrance and practically all the proposed inner harbor for which this vast appropriation is made is within the claimed limits of the alleged grant to plaintiffs' ancestors.

The construction of a breakwater in San Pedro Bay, the extension of the present jetties, and the deepening of the inner harbor, constitute the recommendations of the commission, as necessary to meet the requirements of commerce in a complete and satisfactory manner under the Act referred to; the proposed improvements by deepening the inner harbor cover much of the area within the claimed limits of the grant in hand—but this commission say, "besides the whole of Wilmington Lagoon is available when-"ever the needs of commerce demands it."

"Excellent opportunities are afforded for works of this "class" (dry docks) "on the edge of Wilmington Lagoon."

Concluding the whole matter the commission say:

> "At San Pedro a large expenditure has already been "made for the improvement of the channel leading "into the inner harbor and in the inner harbor itself. "* * * The possibilities for further development of "the inner harbor are equal to any demand upon it. "* * * The availability of the interior harbor and "the Wilmington Lagoon for improvement to any ex-"tent * * * meet more fully the requirements of "the law * * * than Port Los Angeles."

Reference is also made to existing law under Colonel Benyard's project of June 8, 1894, for the expenditure of $392,000 to secure 18 feet of water at mean low tide in the present channel and in the interior harbor, and to a contemplated extension of the Benyard project so as to secure a depth of water of 25 feet and the deepening of a larger area in the inner harber. *Supra.*

This state of the case was brought to the attention of the Attorney-General and the Solicitor-General.

It would seem, from the record in this case, that the plaintiffs' contention is that all the Inner Bay, in connection with which there has been so large an expenditure of public money, and for the protection of the entrance to which there is proposed, in the near future, an expenditure nearly $3,000,000 more, is their private property.

In other words, the plaintiffs invoke at the hands of this Court a rule of construction of the patent made upon this Mexican grant which will establish their right, not only to Mormon Island, but to the entire Inner Bay of San Pedro.

The broad claim is made in the brief of appellants that the line drawn from a point at or near the point designated as "La Goleta," to the western end of Rattlesnake Island is one of the exterior lines of the Hancock surveys; that the title to the entire estate and property within such exterior lines of the whole survey is in them; that the Government never acquired any estate in any part of the Rancho San Pedro; and therefore could convey none; that the "tide "lands," especially within said so-called exterior lines, all belong to plaintiffs; in other words, that they have title to all land and property within such so-called outside lines of the survey, and that the exception in the survey and patent must be wholly disregarded as unauthorized and void.

The result of a holding in accordance with the claims of the plaintiffs would be to give a monopoly of that entire harbor to them.

This is their contention; this the construction of their patent which they seek; and because of the great interests which the Government has in the Inner Bay, leave was asked to file this brief in behalf of the Government that there might be herein presented to the Court the relation of the question of *title* involved to the important interests of

the United States which might be affected by its decision on the construction of this patent.

I.

THE LAND IN CONTROVERSY IS CONFESSEDLY NOT WITHIN THE GRANT MADE BY THE PATENT, AND THEREFORE THE PLAINTIFFS MUST FAIL.

The decree of confirmation is not set out in the patent; but it is claimed by appellants' counsel that it is made part of the patent by being referred to, and they rely upon this decree to control the construction of the patent.

This, under the authorities, they cannot do. The express object of the survey was to locate the decree, and the action of the officers of the Government in making this location was a final adjudication upon the question of location.

The question must therefore turn upon the construction of the patent, without reference to the decree; and as the patent merely conveys the land described in the survey as a whole, and as the land in controversy is admittedly excluded from the survey, it follows that the judgment below is right.

The survey referred to in the granting part of the patent is not merely the survey of the so-called exterior lines (as claimed by appellants); it is the *whole survey* contained in the patent, consisting of the so-called exterior lines and the lines of the portion of the area therein contained which is excepted and excluded. This is the survey contemplated by law, and the entire work of the surveyor, shown by his plat, is the basis of action by the Land Department.

But this is not a case of a reservation or exception in a grant. The patent does not grant the lands included in the so-called exterior lines of the survey, reserving or excepting other lands; but it grants only the land described in the whole survey; which are the lands lying between the so-

called exterior lines and the lines of the Inner Bay of San Pedro as surveyed.

In other words, the exception is *in the survey*; its effect is to exclude from the survey the area contained in the exception; while the grant is for the land thus surveyed without any exception or reservation whatever.

It is claimed by plaintiffs' counsel that the patent grants all the lands included in the exterior survey excepting or reserving "the navigable waters of the bay," and that the actual survey of the bay must be rejected as inconsistent with the general intention. Hence, they urge it includes all the islands in the bay, though these are included in the survey of the parts excepted, and thus excluded from the survey taken as a whole.

Obviously this contention is untenable. The survey was made expressly for the purpose of defining and locating the lands granted, and is of superior dignity to the more general expression.

(See authorities cited, *infra.*)

Besides it is very obvious that the patent was not intended to grant all the land in the bay not covered by *navigable water.* Nine-tenths of the bay would come under this category, for the bay consists in the main of lands covered by shallow water; or, of tide flats alternately covered and uncovered. Nor would it be possible to define by survey the boundaries between the shallow and navigable waters of the bay.

In other words, the law requires after decree that a survey shall be made of the lands the grantee is to have. This duty devolves upon the Surveyor-General.

After his work is performed, pursuant to the decree as he understands it, the result is shown by his report and plat of lands which he regards as belonging to and passing by the

grant. If this view and result be approved by the Land Department, the result thus attained passes into the patent, which alone, if accepted, stands as the evidence and only evidence of the extent of the area of land to which the grantee is entitled.

The action of the Surveyor-General and of the Commissioner of the General Land Office in each case is final and conclusive until reversed by some superior power.

In this case the patent granted only the land surveyed as land belonging to the grant as determined by the Surveyor-General.

The exception was in the survey *and part of it.*

It matters not how the Surveyor-General arrived at his conclusions. The fact to be ascertained is, what lands he reported as belonging to the petitioners under the grant. This duty was confided to him; he had to determine.

This he did determine, and marked on the face of the earth the area which he determined was embraced in the grant; such area did not include the Inner Bay of San Pedro, which was indicated by a separating line, showing that in his judgment and determination the Inner Bay and, of course, all islands in it, were not embraced in the grant, and should be, as they were, expressly excepted from it.

This conclusion was not excepted to by the claimants; in regular way it went to the Land Office, and was carried into the patent. This, when executed, did not purport to convey the excepted area of the Inner Bay. The patent was accepted without question, so far as appears, and therefore the claimants took title only, under the patent, to the area outside the Inner Bay.

That this was all that was conveyed by the patent is perfectly clear; it is in no sense, by the patent, a grant of all, and exception afterward from it.

Not at all; the exception was made in the survey and in

the recitals in the preliminary part of the patent; the *grant* by the patent was of the restricted area, shown by the whole survey, which excluded the Inner Bay.

II.

THE ACTION OF THE LAND DEPARTMENT IN THE SURVEY AND LOCATION OF A MEXICAN GRANT IS JUDICIAL IN ITS NATURE, AND THE APPROVAL OF THE SURVEY, THEREFORE, A JUDICIAL DETERMINATION OF THE QUESTION OF LOCATION, AND AS SUCH, CONCLUSIVE OF ITS CORRECTNESS. THE PATENT IS THE RECORD OF SUCH JUDGMENT AND THEREFORE NOT OPEN TO COLLATERAL ATTACK.

Moore *vs.* Steinback, 127 U. S., 83;
Leese *vs.* Clark, 18 Cal., 572;
Ward *vs.* Mulford, 32 Cal., 371;
Shipley *vs.* Parris, 45 Cal., 539;
Manning *vs.* S. J. Fin. Co., 9 Fed. R., 729;
Mora *vs.* Nuny, 10 Fed. R., 634;
People *vs.* San Francisco, 75 Cal., 389;
Beard *vs.* Federy, 3 Wal., 492.

The question has been the subject of repeated consideration and decision by this Court and by the Supreme Court of the State of California, for a period of over forty years, and for over thirty years it has been familiar law, with reference to Mexican land titles in California, that, after a survey has been approved and passed into a patent, it is, as against all collateral attack, "conclusive evidence * * * " of the boundaries of the tract confirmed." (Gallagher *vs.* Rilly, 49 Cal., 477); and that "claimants under the grant " cannot be permitted, while the patent stands, to aver that " the claim comprised other or different lands from those " mentioned in the patent" (Carey *vs.* Brown, 58 *id.*, 185); or, as otherwise expressed, "be heard to assert title to any

" lands not included in the final survey." (Cassidy *vs.* Carr, 48 Cal., 345.)

> " The approval of the survey, by the proper officers, " is the determination—the judgment of the appro- " priate department of Government, that the survey " does conform to such decree. That determination or " judgment is not the subject of review by the judi- " ciary. It is conclusive upon the courts in actions of " ejectment as the adjudication of a competent tribunal " upon a subject within its exclusive jurisdiction. " The patent which is the final document issued by the " Government is conclusive evidence of the validity of " the original grant and of its recognition and confir- " mation and of the survey and its conformity with the " confirmation * * * and cannot be attacked col- " laterally."
>
> Moore *vs.* Wilkinson, 13 Cal., 487.

The position of counsel for the plaintiff in error is stated on page 9 of his brief. It is, in effect, that the Land Department has no "jurisdiction to fix the boundaries to a Mex- " ican grant nor had the Surveyor-General any such juris- " diction." But, obviously, in view of the authorities cited, this position cannot be maintained.

The authorities we have cited are but a few of almost innumerable decisions to the same effect. The same principle has also since been applied in cases of Mexican grants in other States and Territories, as, for example, in Russell *vs.* Maxwell Land Co., 158 U. S., 253 (cited by Mr. Chandler, on page 8 of his brief), and in Stoneroad *vs.* Stoneroad, *id.* 240).

The law is very clearly expounded in the decision of the Supreme Court of California, now under review, and is fully sustained by the authorities there cited (91 Cal., 402); nor is it true, as claimed by counsel for plaintiff in error (brief, p. 29), that, " in all but one (of the cases cited) the grants

"involved, were of specific quantities of land, lying in "larger bodies." Moore *vs.* Wilkinson was of that kind, and in Teschemacher *vs.* Thompson it was assumed for the sake of argument, that the grant was of the same character. But in both cases this circumstance was immaterial, it having been claimed in the former case that the land in controversy was outside the boundaries of the larger tract, and in the latter that it was outside the line of high water.

In all the other cases the grants were of specific tracts, confirmed by metes and bounds.

Among the latter is especially to be noted the case of Chipley *vs.* Farris (45 Cal., 527), which, it will be observed, was in effect affirmed by the Supreme Court of the State of California in United Land Association *vs.* Knight (85 Cal., 484), and distinguished from that case.

It is, however, directly in point to the case at bar, and deserves attention for the peculiar distinctness of the questions involved and of the decisions of the court thereupon.

In that case an accurate survey of the boundaries of the grant as established by the juridical possession, was made by a competent surveyor in advance of the decree of confirmation, and the metes and bounds of the survey were carried into the decree, which was set out at length in the patent, so that there could be no kind of mistake or uncertainty about the precise location of the confirmed boundaries. But the Surveyor-General (apparently for the purpose of making the boundaries of the grant conform to the system of public surveys) omitted from the western part of the grant a triangular piece of land of some thousand acres in extent, and included some three or four thousand acres lying to the north of the north boundary as given by the decree of confirmation.

It was clear, therefore (had the question been permissible), that the Surveyor-General had deliberately, and, we

may say, wantonly, departed from the boundaries given in the decree of confirmation; but it was nevertheless held that the patent "is a record which binds both the Govern- "ment and the claimant, and cannot be attacked by either "party, except by direct proceedings instituted for that "purpose." (45 Cal., 538.)

This case is cited, not as necessary to establish the rule, which is too familiar to be questioned, but as illustrating the nature of its application.

The true rule is well stated in the opinion in this case in the court below:

> "It is true the duty of that officer was to locate the "confirmed grant in conformity with the decree; but "it does not follow that when the survey has been "made, approved and acted upon by the Land Depart- "ment, its correctness may be impeached or disregarded "in an action of ejectment, and that, too, by one who "claims under the very proceedings of which the sur- "vey was an essential part."

Of course, it is perfectly well settled that it is the duty of the surveyor to follow the decree and that a failure to do so will be error, for which, on a direct proceeding, the survey will be set aside; but it is confidently asserted that no case can be found where a patent has been collaterally attacked for such a cause.

In Beard *vs.* Federy, 3 Wal., 478, cited, it is said: "The "patent is not only a deed; *it* is a record of the action of "the Government upon the title of the claimant. By *it* the "Government declares that the claim was valid, * * * "and is correctly located now so as to embrace the premises "as they are surveyed and described. * * * This "record, so long as it remains unvacated, is conclusive as "against the Government * * * and parties claiming "under the patent."

No one can be permitted, collaterally, to question "the "correctness of the action of the tribunals and officers of "the United States *in the location* of the same."

Otherwise "the patent would fail to be an instrument of "quiet," &c.

It may be safely said that the doctrine in

Chepley *vs.* Farris, 45 Cal., 539,

is the recognized rule in all the courts; that the patent is not only conclusive against the patentee as to land excluded from the survey, but absolutely conclusive against all parties, unless vacated.

Said Mr. Justice Field in

Knight *vs.* Land Ass'n, 142 U. S., 161:

> "If there was error in the survey embodied in the "patent it could not have been shown in this action. "It could only have been corrected by direct proceed- "ings for that purpose instituted by the Government or "by its authority.
>
> "This is elementary law, and in vain will authorities "be sought to contradict this view."

Moreover, the reasons given by the Surveyor-General as to his work are not material. The work, when completed, and carried into the patent represents the final decision of the Land Department as to the location, area and surface of the grant, and this is final, until reversed.

The numerous cases cited by the defendant establish not only that the Land Department is authorized to pass upon boundary lines, but that its action is conclusive. But it is sought here to avoid the effect of that action by investigating the reasons which governed the Department. Had the officers who prepared the patent omitted the so-called "exception" entirely by running around the inner shore of the Inner Bay of San Pedro, no one would pretend that any

question could be raised in this action with reference to the validity of that act. It would be conclusive that nothing outside that line passed. Is it rational to assert that a different conclusion must be reached because of the method adopted which leads to the same result? Indeed, the Surveyor-General, in his final certificate, states (T., p. 23, f 39): "I have caused the said tract to be surveyed in conformity "to the boundaries specified in said confirmatory decree." The officer here refers not to a part of the survey, but to the *whole* survey, and the whole survey means the tract remaining after eliminating the exception.

The conclusions, therefore, of this phase of the case would seem to be these:

The survey and location of a Mexican grant by the proper officers, followed by a patent, is conclusive that the grant is correctly located in accordance with the decree, and that the location cannot be attacked; the patent simply grants the land surveyed, and nothing more or less.

In this case there is no room for controversy as to the construction of the patent. It excludes the land included within the survey of the Inner Bay of San Pedro.

The law upon this point is well settled by the authorities cited.

By the 13th section of the Act of 1851 a survey by the Surveyor-General is expressly provided for; the object of which was obviously to have a precise and definite location of the land; and accordingly all patents are issued not for the grant generally, but *for the land described in such survey.*

> "The approval of the survey by the proper officers "is the determination—the judgment of the appro- "priate department of the Government that the survey "does conform to such decree. That determination

"or judgment is not the subject of review by the "judiciary. It is conclusive upon the courts in ac- "tions of ejectment, as the adjudication of a compe- "tent tribunal upon the subject within its exclusive "jurisdiction. The patent, which is the final docu- "ment issued by the Government, is conclusive evi- "dence of the validity of the original grant and of its "recognition, and of the confirmation of the survey "and of its conformity with the decree."

Moore *vs.* Wilkinson, 13 Cal., 487.

III.

THE PLAINTIFFS ARE ESTOPPED TO CLAIM THIS ISLAND.

The patent of the plaintiffs is dated December 15, 1858; that of defendant December 30, 1881.

Each patent conveyed distinct tracts of land without conflict on their face.

Nothing within the Inner Bay was within the terms of plaintiffs' patent, and by accepting the conveyance knowing its recitals; taking no steps whatever hitherto to correct it if erroneous; resting upon it without objections all these years, it is too late now to urge these objections.

Especially, as between them and the Government which has acted on such acquiesence—

1st. By public improvements as to national commerce, involving large expenditures of public money in the past, and great plans and appropriations of money for the future, all based on the assumption that the Inner Bay of San Pedro (Wilmington Harbor) was public property, the Government treating the whole Inner Bay in accordance with such acquiesence.

2d. By patenting interior lands to others as to Banning, &c., &c.

IV.

THE PLAINTIFFS RECEIVED MORE LAND THAN THE GRANT CALLED FOR.

The construction of the patent by the Supreme Court of California does not deprive the plaintiff of any property originally granted. While the patent description is conclusive upon the Government as well as the patentees until set aside in a direct proceeding, yet as the original grant has been referred to, and also the decree of confirmation, it may be of interest to know that eight and one-half leagues were supposed to be included in the decree of confirmation of the United States court. (T., p. 20, f. 34.)

The land actually contained in the patent, adopting the so-called exterior lines, is.....	44,219.72 acres.
The territory excluded contains.....	1,100.50 acres.
Balance after deducting the exception.....	43,119.13 acres.
Eight and a half leagues.....	37,729.78 acres.
Excess of patented land after deducting the exception.....	5,389.35 acres.

The fact that the patentees made such a favorable bargain and succeeded in getting so much more land than the district court intended to confirm to them, may account for the fact that they have never questioned the patent, but have stood upon it and relied upon it since the date of its issuance, February 19, 1858.

Moreover, they have permitted the Government to improve the harbor which is now claimed to be a part of their domain.

The practical construction given by all parties to this instrument is of some value.

The fact that the Government patented the disputed premises to Banning (T., p. 38, pp. 66–7) is evidence that there was no adverse claim at the date of the issuance of that patent, viz.: December 30, 1881.

V.

THAT AN ERROR WAS COMMITTED IN THE EARLIER PROCEEDINGS IN THIS MATTER IS VERY PROBABLE, BUT THAT ERROR CONSISTED IN INCLUDING AT ALL WHAT IS KNOWN AS RATTLESNAKE ISLAND, BEING THE COLORED TRACT SHOWN TR. PAGE 73.

This conclusion may well be reached from the circumstance that the original grant, which included the Rancho Palos Verdes, was quite ambiguously described (T., p. 18), but there is nothing in the grant indicating the intention to take in the bay. The following language is significant:

> "Thence down said river [the San Gabriel River] "*to the coast;* thence *along said coast* to a point oppo- "site the salt pits (la salina); thence following certain "piles of stones placed as boundary marks (majoneras) "to the point of commencement."

While this description included the Rancho Palos Verdes, yet it ran from the mouth of the San Gabriel *up the coast* to a point indicated by "witness stake," near the salt works (see map, p. 73, n. w. corner).

In order to accomplish this it was necessary to run along the northern shore of the "inner bay of San Pedro exception" (see patent), and no doubt the work was completed by passing between Rattlesnake Island and lot number 37. It will be observed that there is a water opening between Rattlesnake Island and the last-named lot, connecting the Inner Bay with the ocean, and the original grant shows very plainly that the survey was made by following the coast

throughout on the inner shore line of the bay. It is utterly absurd to attempt to construe the original grant description as meaning that the Mexicans who made the survey crossed the mouth of the Inner Bay of San Pedro, and it is unlikely that the island referred to, which is nothing but a sand dune, was deemed of any value in those days. A striking corroboration of this view is found in the fact that the tract remaining after the deduction of the bay and Rattlesnake Island amounts to practically 8½ leagues—the quantity granted.

These circumstances are of considerable value in reaching a conclusion as to the true construction of the patent.

VI.

TAKING THE WHOLE RECORD TOGETHER, PLAINTIFFS ARE NOT ENTITLED TO THE INNER BAY OF SAN PEDRO, OR ANYTHING IN IT, BELOW THE LINE OF EXTRAORDINARY HIGH TIDE, IF MATTERS OUTSIDE THE SURVEY AND PATENT ARE TO BE CONSIDERED.

The petition presented to the Board of Commissioners for settling private land claims in California, which was the foundation of plaintiffs claim (Transcript, p. 17); that the boundaries of the claim are well known, defined and respected; that "judicial possession," the important factor in the grant, was given in 1817 for the land claimed, viz.: Commencing at a large alder tree * * *; thence east to the river San Gabriel; thence down said river *to the coast; thence along said coast* to a point opposite the salt pits (la salina); thence following certain piles of stones placed as boundary marks to the place of beginning.

With the large map on tracing paper before the Court, this general description can easily be followed (although it should

be noticed that the Surveyor-General, starting at the initial tree, went west and so on around, instead of going east, then south, thence along the coast, &c.).

According to the petition, you go east to the San Gabriel River; thence down said river to the coast; "thence *along* "*said coast* to a point opposite the salt pits."

This covers three sides of the grant, and includes the Rancho Palos Verdes, as shown under point V, and leaves outside the Inner Bay and Rattlesnake Island.

The water connection of the Inner Bay eastwardly to the ocean is clearly apparent, so that the call in the description, "thence along said coast" absolutely excludes the Inner Bay, and therefore, as to the Inner Bay, the Surveyor-General was bound to exclude it from his survey of the grant.

The exception in the survey was "that portion covered "by the navigable waters of the Inner Bay of San Pedro, "and which are included within the following-described "lines," &c.—being the lines plainly encompassing the Inner Bay on the map. (Tr., p. 43.)

Hence the boundary of these "navigable waters" is shown by the meandered line on the map about the shore of the Inner Bay.

"Navigable waters" must be understood in the common law sense to be waters in the sea or an arm of the sea where the tide ebbs and flows, and as the *shore line* of such waters had necessarily to be determined, the establishing of such lines was clearly within the jurisdiction of the Surveyor-General. When his work thus fixing the shore line of the "navigable waters" was completed, and platted and reported as not within the grant and the survey has passed into patent, which was received by the grantee without objection, everything within such "shore line," so shown, is conclusively excluded from the patent.

Surely nothing within such "shore line" can be recovered in ejectment under such patent, as against a subsequent grantee from the sovereign; either the State as to tide lands or the United States as to islands.

If tide lands within such shore line should be conveyed by the State, it is perfectly clear that so long as the survey and patent stood unreversed, the grantee of the State could not be ousted in ejectment by the patent grantee.

The action of the Surveyor-General in making, and of the Land Department in approving, the *whole* survey determined what were tide lands, entirely around the Inner Bay. These went to the State, and every island in the bay to the United States, because not embraced in or connected with the *land* found to be the granted land by these officers.

The high water mark found by the Surveyor-General and approved by the Land Department controls.

Knight *vs.* Land Ass'n, 142 U. S., 161.

Now, the title to tide lands—that is, the shore below high water mark, along the sea, or arms of the sea, is in the sovereign.

This is also the rule of the Spanish and Mexican law.

In the United States absolute property in the soil under tide water is reserved to the several States.

Tide lands are vested in the sovereign for the benefit of the whole people.

Shively *vs.* Bowlby, 152 U. S., 1.

Upon the acquisition of California from Mexico the United States took all tide lands in trust for future States under the above rules, unless such lands had been previously granted by Mexico.

Knight *vs.* Land Ass'n, 142 U. S., 161.

But the Mexican grantee in this case took no interest in submerged lands adjacent to his grant because—

(*a*) The grant does not purport to convey submerged lands; the petition avers that its boundary was down the San Gabriel river to the coast, thence *along said coast* to a point opposite the salt pits."

(*b*) Grants of land made by Spain or Mexico, bounded by the sea or navigable waters, extend only to *extraordinary* high tide.

Valentine *vs.* Sloss, 103 Cal., 103, and cases cited.

This is laid down as a principle of Roman law (adopted by Spain and Mexico, in—

Morgan *vs.* Negodich (La.) 3, S. Rep., 639, 40 La. An., 246, where it is also said that according to the Civil Code of that State, Art. 451, "The sea there is that space of land "over which the waters of the sea spread in the highest "water during the winter season."

> "By the civil law the seashore included the land "as far as its greatest wave extended in winter."
>
> Galveston *vs.* Menard, 28 Tex., 359, citing *Inst. Justinian*, etc.

These authorities could be largely extended.

Now, it is perfectly clear, that the line of high water tide even, or more strongly, extraordinary high tide, leaves the coast to the eastward of the east end of Rattlesnake Island, a short distance from the mouth of the San Gabriel River, and the judicial possession recited in the petition must be taken as following that line.

No presumption arises that the grantee took anything in the "tide lands" along the coast, or any interest in the

"shore," because as a matter of general law grants of land bounded by the sea extend only to high-water mark.

Howard *vs.* Ingersoll, 13 Howard, U. S., 421;
Teschmaker *vs.* Thompson, 18 Cal., 21;
More *vs.* Massini, 37 Cal., 435.

In the latter case, the question was whether a portion of the sea, included within the courses and distances of the survey, but not within any other description in the survey, passed by the patent.

The court held that the boundaries fixed by the survey, going into the sea, came in conflict with the well-settled rule that land bounded by the sea extended only to high-water mark—a rule absolutely conclusive in every case except where the intention to depart from it is clearly and unmistakably manifested in the grant itself, and so, that the tide lands did not pass to the grantee of the patent.

The lines of survey upon the map in the Transcript clearly indicate the "shore line," and thus the tide lands which, in the judgment of the surveyor, did not pass by the grant.

On the inner side of the bay—on the south shore of the main land, and the northerly side of Rattlesnake Island—as well as on the outer side of the latter, their "shore line" is clearly marked, showing that as to the bay the area is regarded as navigable waters, and therefore did not pass to the grantee.

Such a delineation was necessary, because such waters and the soil beneath did not pass by the grant. It is, therefore, confidently submitted that the court should hold that the survey so delineated is in exact conformity with the rules of law, as above stated. He was bound to fix these lines, showing the limits of tide, to which the grant would extend.

Below them are the tide lands and navigable water, in

which, and to the islands as well, plaintiffs could take nothing.

It would seem to follow, therefore, irrespective of the express exclusion of the Inner Bay from plaintiffs' patent, that under the principles of general law plaintiffs could take nothing under this grant within the shore line of the bay, and therefore, on both grounds, the judgment of the court below should be affirmed.

Nicholas Conrad

Solicitor-General.

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No. 24

Supreme Court of the United States

OCTOBER TERM 1895

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

Ana J. Dominguez de Guyer, et al.,
Plaintiffs in error.
vs.
William Banning.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR, ON RE-ARGUMENT.

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IN THE

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SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR, ON RE-ARGUMENT.

This cause was duly argued and submitted (October term, 1895), but the submission was set aside and the matter is before the court for re-argument. In view of the points raised at the hearing and the difficulty experienced in reaching a result, it is deemed advisable to offer the following supplemental suggestions:

Ejectment Cannot be Maintained on an Equitable Title.

It will be observed that plaintiffs claim in their supplemental points that they have certain equities upon which they are entitled to recover. That they have no equities whatever can be readily shown; but

for purposes it may be conceded, for argument's sake, that such equities exist still the same cannot be established in this case. Counsel has not cited and cannot cite a case in California, or elsewhere, holding that in ejectment the plaintiff can succeed upon an equitable title. And even were the plaintiffs in the position of defendants, they could not assert equities here unless they had, by answer, pleaded the facts. In the first place, counsel claims that the distinction between law and equity in California has been abolished. But it was early held in that state that the essential and inherent distinction between law and equity, as two separate though connected sciences, is not abolished.

Smith *v.* Rowe, 4 Cal. 6.

The distinction between law and equity continues as marked as ever, though there is no difference in the form of a bill in chancery and a common law declaration under our system.

DeWitt *v.* Hays, 2 Cal. 464.

The Code of Civil Procedure of California, which was in force when this action was inaugurated and which accords with the Old Practice Act of that state, is as follows:

"There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."

In Lux *v.* Haggin, 69 Cal. 267, one of the most carefully considered cases ever decided by the Supreme Court of California, it is said:

"Section 307 declares: 'There is but one form of civil action,' etc. That section does not abolish the distinction recognized by the constitution between law and equity."

Professor Pomeroy gives his views of the reform

procedure as follows: [Pomeroy's Remedies, 3d Ed., Sec. 75.]

"The pleader must narrate in a plain and concise manner the actual facts from which the rights and duties of the parties arise and not his conception of their legal effect; nor, on the other hand, the mere detail of evidence which substantiates the existence of those facts. The comprehensive principle applies to all kinds of actions, to one founded upon a legal right and seeking a legal remedy, and to one founded on an equitable right and seeking an equitable remedy, and it avoids all questions and difficulties as to the issuableness of the matters alleged. Undoubtedly from the very nature of the primary rights invaded and of the remedies demanded the narrative of facts will generally be much more minute, detail and circumstantial, in actions brought to maintain equitable rights and to recover equitable relief than in those based upon legal rights and pursuing legal relief, but this incident does not alter or affect the principle which governs all cases; the pleader in both cases sets out the facts which entitle him to the remedy asked and no more; it simply happens that legal remedies usually depend upon a few positive facts, while equitable remedies often arise from a multitude of circumstances, events and acts, neither of which, taken by itself, would have created any right or imposed any duty."

In discussing the rules of pleadings under the code, Justice Field says:

"Each party must allege every fact which he is required to prove and will be precluded from proving any fact not alleged. * * * The plaintiff on his part must allege all that he will have to prove to maintain his action. * * * It must be recollected then in the first place that every fact essential to the claim or defense should be stated."

Green *v.* Palmer, 15 Cal. 415.

Manning *v.* San Jacinto Tin Co., 9 Saw. 726, was a case where the suit was based upon the theory that the patent was fraudently located. The court says [p. 731]:

"The proceeding for locating the grant was, under the decree of confirmation, pending between the United States and the claimant under the grant when the act of congress of 1866 was passed and the mining claims were located, and the genuineness of the grant and its location are *res adjudicata*, under the authorities cited, between the United States and the patentee; and the adjudication is that the grant is correctly located as well as valid."

We have already called the attention of the court in the former brief to United States *v.* Throckmorton, 98 U. S. 68, and other cases of similar import. [See brief of defendant in error, pp. 6, 7, 18.]

The plaintiffs must recover upon the strength of their own title, no matter how weak the title of their opponent may be.

Reay *v.* Butler, 95 Cal. 206;

Gage *v.* Downey, 94 *id.* 241.

This rule is not peculiar to California, but is of general application.

Wallace *v.* Swinton, 64 N. Y. 192.

Assuming That Plaintiffs' Pleading Was Sufficient to Permit Proof of Equitable Title, There is no Evidence of the Existence of any Equities in favor of Plaintiffs.

The premises in dispute are excluded from the patent. This is an attack upon the patent. It is a claim that the government of the United States erred in not including the disputed premises within the lands patented. There is no fraud shown, and the

rule with relation to the proof of fraud in such cases, is very strict.

Vance *v.* Burbank, 101 U. S. 519, and cases cited;
Marquez *v.* Frisbie, 101 U. S. 473;
See also, U. S. *v.* Flint, 4 Saw. 51-3.

It must not be forgotten that the plaintiffs here are the patentees of the Rancho San Pedro and they are claiming under the patent, and they have offered it in evidence, and now seek to establish, without any pleading or proof showing fraud, that there ought to have been comprised within the patent limits the land in dispute, together with the bay of San Pedro. They voluntarily submitted to the jurisdiction of the tribunals appointed by the United States. This precludes them from now attacking that jurisdiction.

In Cassidy *v.* Carr, 48 Cal. 339, the Supreme Court of that state decided that if the claimant of a Mexican grant presents the same to the board of land commissioners for confirmation and it is confirmed and surveyed and the survey is approved and a patent issued but by the survey a portion of the land included within the juridical measurement of the Mexican authorities is excluded, the claimant is estopped from afterwards asserting title to the land not included in the survey made by the United States.

In Boyle *v.* Hinds, 2 Saw. 527, the same point was decided, and Judge Sawyer remarks:

"The survey and patent but carry out the decree of confirmation. The patent is the final authentic record of the proceeding and is conclusive evidence between the parties of the extent of the grant and the correctness of its location."

More *v.* Steinbach, 127 U. S. 70, is a case quite similar to this. There the patentee claimed that the juridical possession given by the Alcalde vested in the

grantee a perfect title, and that his right to such lands was not lost by reason of the fact that the same were not included in the subsequent survey of the claim and in the patent.

It seems superfluous to add any authority to Knight *v.* The United Land Association, 142 U. S. 161, where the decision appealed from herein was referred to with approval.

Indeed, since Beard *v.* Federy, 3 Wall. 492, all the courts of the country have united in holding that the claimant as well as every one else is bound by the survey.

It is not, as plaintiffs desire to impress upon us, the mere act of the surveyor which is subject to attack, but that survey, when approved, became the authentic and valid adjudication of the government of the United States.

"That the power to make and correct surveys of the public lands belongs to the political department of the government, and that while the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except in a direct proceeding, and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

See Cragin *v.* Powell, 128 U. S. 691, and numerous authorities cited, to which we respectfully refer the court, many of them being adjudications where Mexican grants were involved.

In speaking in the same connection, Mr. Justice Field says, in Smelting Co. *v.* Kemp, 104 U. S. 636:

"In the course of their duty the officers of the department are constantly called upon to hear testi-

mony as to matters presented for their consideration and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore, it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by direct proceeding for its correction or annulment."

To the same effect is Steel *v.* St. Louis Smelting & R. Co., 106 U. S. 447.

How can there be any doubt that plaintiffs are bound to rest absolutely upon their patent? And this being true, the judgment must be affirmed, because the disputed premises are not within the calls of the patent, and also for the reason that the mere question, whether the calls of the patent do include the disputed land, presents no federal question whatever.

The Patent Issued to William Banning [Tr. pages 38-9, fols. 66-7] Makes Out a Prima Facie Case in his Favor.

"It is frequently said that a patent from the government is the highest or best evidence of title. By this is meant merely that since all titles come from the government, a chain of title derived in due course from that source, accompanied by possession, is perfect. But any kind of governmental grant is of equal validity with a patent. An act of congress, for instance, is of the same rank as evidence, though as an instrument of quiet and security a patent is preferable to all other species of grants."

Sedgwick & Waite on Trial of Title, 2d Ed. Sec. 785.

The same authors again state the doctrine thus [Sec. 887]:

"The theory of the law is that the land department acts judicially in issuing a patent; that the officers charged with this duty exercise a judicial function, and that their judgment as to matters of fact properly determinable by them is conclusive when brought in question in a collateral proceeding. The patent, duly signed and sealed, does not merely pass title, but is an official declaration by the government that all the requirements preliminary to its issue have been complied with."

Even if the record showed that plaintiffs had prior possession of the premises in dispute, this would not avail them.

Said this court in Burgess *v.* Gray, 16 How. 48, in speaking of the rights of a party in possession without title:

"He cannot maintain it (a suit) against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself, before he can call into question the validity of theirs."

See also, Oaksmith *v.* Johnson, 92 U. S. 343.

The Supreme Court of New York covered the ground substantially in Jackson *v.* Marsh, 6 Cow. 282, as follows:

"The patent is evidence of the plaintiff's right, until set aside or vacated. The inhibition in the act is not against the issuing of any patent; but against issuing until satisfactory proof be produced that the purchaser has satisfied the occupant. We are authorized to presume, *omnia solemniter acta*, that public officers, to whom the government committed important trusts, had discharged their duty faithfully, and received the necessary proof, before the patent issued. No evidence was offered that the requisite proof was not produced to the commissioners. The question is, therefore, not raised, whether an inquiry of this kind was

admissible on the trial. But if the question had been presented, I think the doctrine contained in the case of Jackson *v.* Lawton, 10 Johns. 23, decisive: 'If the patent was issued by mistake, or upon false suggestion, it is voidable only, and unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or prohibited by statute, they can only be avoided in a regular course of pleading.' And again: 'When the defect arises on circumstances *dehors* the grant, the grant is voidable only by suit. It would be against precedent, and of dangerous consequence, to permit letters patent to be impeached collaterally.' "

In treating of the same matter the Supreme Court of New York said, in People *v.* Mauran, 5 Den. 397–8:

"It was also insisted that the patent was not evidence of the grant without proof that the notice of the application therefor had been given as provided by the statute, and also that the grantees were the proprietors of the adjacent lands. These objections are untenable. The principles governing here have no analogy to the rules applicable to the cases to which we were referred on the argument, such as purchasers under sales for taxes, and the like. Parties claiming under such proceedings are bound to show the existence of all the prerequisites necessary to give the officer under whom they purchased, authority to sell, for the reason that he has but a special authority to do any act of that sort. On the contrary, it has at all times been held that a patent was *prima facie* evidence that it was regularly issued, that all things preliminary had been performed and complied with; the legal presumption in such case being that public officers have done their duty *omnia solemniter acta*."

These cases certainly dispose of the point made by plaintiffs' counsel at the last argument to the effect that the patent to Banning is not *prima facie* evidence of title.

If the patent to the Rancho San Pedro covered the disputed premises, then plaintiffs could avoid the effect

of the patent to Banning, because it would then appear from the record made by the government itself, that the latter had, by earlier grant, parted with "all possi-"ble interest in Mormon island." But as the disputed property is not included within the San Pedro patent, plaintiffs' claim is necessarily terminated, and defendant has a perfect title under his patent.

The attempt to deduce the fact of prior possession must prove unavailing, because when the land office awarded the patent to Banning, it necessarily found as a fact that there were no adverse claimants, and this determination as to that fact was conclusive.

Cragin *v.* Powell, 128 U. S. 691.

Plaintiffs cite Miller *v.* Railroad, 71 N. Y. 383, as holding that a deed from the government not in possession and not shown to own title is no evidence of title. The case cited decides nothing of the kind. The point determined was that where the land has not been occupied, improved or enclosed and reliance is placed solely upon paper title, the proof must be of the chain of title from the original patentee or donee. The court did not attempt to assert that the patent itself did not constitute *prima facie* evidence of title. On the contrary, it explicitly determined that a person not in possession must show a title based upon a patent. This decision is valuable for another reason. The court says [page 383]: "It is believed that there "is no authority, and certainly our attention has been "called to none, ever holding that occasional entries at "long intervals of time upon such a lot not parcel of an "improved farm or connected with one, furnish evi-"dence of the requisite possession."

On page 3 of their memorandum of authorities filed March 20, 1896, plaintiffs declare that the government originally had no title to the disputed

property, and that the decree establishing the boundaries of the original grant made it legally impossible for the government to acquire the excepted part against the terms of that decree. This view is disposed of by Knight *v.* The United Land Association, 142 U. S. 161; Chipley *v.* Farris, 45 Cal. 539, and the numerous decisions cited, pages 6 and 7 of the original brief filed by defendant. Counsel also cites 45 N. Y. 703, as holding that the exception in conveyance can give no title to a third person. The decision relied upon has no relation to this case or bearing upon it. The exclusion of the disputed property from the grant left the title in the government of the United States. The issuance of the patent settled the question that the grantee of the Mexican government was not entitled to Mormon island and the same was properly treated thereafter as government land, and it was upon this theory that the patent to Banning was issued.

The Authorities Cited by Plaintiffs With Reference to Their Claim of Prior Possession, Have no Relevancy, in View of the Admitted Facts Here.

Foot *v.* Murphy, 72 Cal. 104, cited by plaintiffs, was a case where the decedent took possession of the land in question ten years prior to the date upon which the ouster occurred, and that it was continuously subject to the will and dominion of the decedent and his successors up to the date of the ouster.

At the argument I understood the learned counsel for plaintiffs to rely upon a prior possession which he supposed, as a matter of inference, was enjoyed by the plaintiffs' predecessors about three-quarters of a cen-

tury before the suit was instituted. I do not understand that plaintiffs claim to have exercised any dominion over Mormon island since the American occupation, or for a generation earlier. And indeed, it is going too far to assume that they ever controlled the property at all. The decision of the land department in issuing the patent to Banning, [Tr. pp. 38-9], is an adjudication to the contrary.

Three cases, commencing with Sheldon *v.* Mull, 67 Cal. 299, are cited by plaintiffs to show that an ouster may be established without evidence, that the land was enclosed so as to deprive the plaintiff of the possession thereof, and that actual possession may be had without fences or enclosures. These cases are of no moment at all; because there is no proof that the plaintiffs pastured the property in suit, or exercised the slightest control or influence over it, or ever did anything with relation thereto, or ever passed over it, or looked at it otherwise than furtively.

Goodwin *v.* Scheerer, 106 Cal. 692, was a case where forcible possession was taken by one without title.

Hubbard *v.* Barry, 21 Cal. 323, is relied upon by the other side. It was there shown that the plaintiff entered into peaceable possession and caused the land to be substantially enclosed, and that while this actual possession continued, the defendant intruded without right.

Bynette *v.* Culfield, also cited in plaintiffs' points filed March 20, 1896, I am unable to find.

The cases of Carleton *v.* Darcy, 90 N. Y. 573, and Mayor of N. Y. *v.* Carlton, 113 N. Y. 289, do not help plaintiffs in any degree. In the latter of these it appears that the city of New York, having been in the absolute, uninterrupted and peaceable possession of certain premises, permitted, during a temporary

absence of actual possession upon the part of the municipality, an intruder to enter. It was there said in speaking of the abandonment of possession: "Such "abandonment may be evidenced by an unequivocal "act, or by long continued absence from and inatten- "tion to the land, or it may be inferred from other "circumstances."

In the present instance not a witness testified and not a scintilla of evidence is before the court that there was any possession by plaintiffs or either of them.

In Plume *v.* Seward, 4 Cal. 96-7, the Supreme Court of California remarked:

"At the last term of this court we decided possession was *prima facie* evidence of title and sufficient to maintain ejectment. What acts of ownership were necessary to constitute possession was not involved in that decision. From a careful examination of the authorities I am satisfied that there must be an actual bona fide occupation and *possessio pedis*, and subjection to the will and control as contradistiguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes," etc.

But plaintiffs never had prior possession. Plaintiffs' possession is limited by the ranch patent which is the result of their application. The defendant testified, see page above referred to, that he entered in April, 1880; that he has had exclusive possession ever since; that no claim of any one else was made to the possession, except plaintiffs' claim, of which Mr. Banning heard about one year before the suit was brought. Now, the suit was brought May 17, 1886, [Fol. 2], and the patent of the United States issued to Banning December 30, 1881. [Tr. p. 39, fol. 67.] Therefore, from 1880 until one year before the suit was brought —in other words, until 1885, which was four years

after the issuance of the patent, Banning never heard of plaintiffs' claim. When he entered upon the tract he testifies [Tr. fol. 19], he found another party in possession. He took a deed from this person. [Tr. fol. 68.] Of course no title passed by such deed, but peaceable possession was obtained as the result thereof. There is not a word in the record anywhere justifying the assertion that defendant intruded upon plaintiffs' possession.

In the first place, if plaintiffs ever had possession of the premises in controversy, such possession was abandoned by the proceedings which accompanied and followed the acts of the board of land commissioners and which eventuated in the patent. As to all land not actually patented their claim was abandoned; and there is not a syllable anywhere in the record showing that they ever had actual possession of Mormon island—the property involved herein.

The Patent is Conclusive Regardless of the Recitations of the Decree.

This subject is very fully considered in Knight *v.* The United Land Association, 142 U. S. 161. There the power of the interior department in the matter of surveys of public lands, including Mexican grants, is considered, and it is said, among other things: "It is a well settled rule of law that the power "to make and correct surveys of the public lands "belongs exclusively to the political department of "the government and that the action of the depart- "ment within the scope of its authority is unassail- "able in the courts, except by a direct proceeding."

Later on in the opinion the court quotes with approval the following from Beard *v.* Federy, 3 Wall. 491:

"The position of the defendants is, that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain and Mexico. In the first place, the patent is a deed of the United States. As a deed its operation is that of a quit-claim, or rather a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not effect the rights of the inhabitants to their property.

"They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and

measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunal and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid, under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive."

Mr. Justice Field, concurring with the majority, elaborately and ably reviews the entire subject. We quote:

"The reasons given by the court below on the second affirmance of the judgment of the referee are marked by the objections stated in its former opinion. The true doctrine as to the effect of patents in actions at law is stated in a decision of the court below in De-Guyer *v.* Banning—rendered whilst this case has been pending here, in which that court, following a long line of previous adjudications, unbroken except by this case, declares that upon a confirmation of a Mexican grant the patent issued by the United States to the claimant is the only evidence of the extent of the grant, and that if there is a conflict as to its location and extent between it and the decree of confirmation, the patent must control. It is the only doctrine which will insure peace and tranquility to parties holding under patents issued upon confirmed Mexican grants. Any other doctrine would introduce endless confusion and perplexity as to all such titles. If there be, in fact, any material conflict between the boundaries given in the decree of confirmation and those described in the official survey, the only remedy is to be sought by direct proceedings instituted by the government, or

by its authority. Until the alleged conflict is thus determined and adjusted, the patent must control."

It will thus be observed that this very cause was the subject of judicial consideration, and that the views of the Supreme Court of California were here confirmed.

The true doctrine to which Justice Field alludes as having been stated by the court below can be found in DeGuyer *v.* Banning, 91 Cal. 402–3. There the Supreme Court of California reiterated the doctrine of Chipley *v.* Farris, 45 Cal. 527. It is also to be noted that this court in the Knight case, *supra*, referred with approval to the decision of the Supreme Court in Teschemacher *v.* Thompson, 18 Cal. 26. In that cause Justice Field, who was then chief justice of California, said:

"By the act of March 3d, 1851, the government has established a tribunal for the investigation of the validity of the titles asserted to have existed previous to the cession; required evidence to be presented respecting the same; designated law officers to appear and litigate the matter on behalf of the United States; authorized appeals, first to the District and then to the Supreme Court; and appointed surveyors to survey and measure off the land, when once the title has been recognized and confirmed. By the various proceedings required, numerous securities are afforded against imposition and fraud. As the last act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government so as to embrace the premises as they are

surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent.

"The patent, it is true, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the board of land commissioners. [Moore *v.* Wilkinson, 13 Cal. 485; Yount *v.* Howell, 14 *Id.* 469; Stark *v.* Barrett, 15 *Id.* 361; and Ely *v.* Frisbie, 17 *Id.* 250.] But as the record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant—such title depending, up to the issuance of the patent, upon the character of the grant and the proceedings of the former government in reference to it, whether it were of a specific tract separated from other lands by defined boundaries, or were only of a specific quantity lying within an area of larger extent; and in the latter case, whether or not the quantity had been located by official authority.

* * * * * *

"The patent, therefore, to the plaintiffs, considered as issued upon a grant of the character which we have assumed it to be, is evidence that the grantees possessed at the date of the cession a vested interest in the quantity of land mentioned in the grant—a right to so much land to be afterwards laid off by official authority; that the premises in controversy were then subject to appropriation in satisfaction of the quantity granted; and that the government of the United States, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees and attached it to the tract as surveyed."

It will thus be observed that it has been held that the action of the government, as shown by the issuance of the patent, is not only conclusive as to the genuineness of the previous grant, but is also equally conclusive that the survey carried into the patent correctly locates the grant.

To the same purport is Chipley *v.* Farris, 45 Cal. It is there said, pages 538–539:

"A patent, issued under the act of 1851, is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government and for the segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant and cannot be attacked by either party except by direct proceedings instituted for that purpose. [Leese *v.* Clark, 18 Cal. 535.] While it stands, the claimant or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. Such being the nature and effect of the patent, the evidence offered by the plaintiffs to prove that the patent was void was properly excluded."

We especially commend to the consideration of the court in this case the following terse statement of the rule laid down in Chipley *v.* Farris, *supra*:

"It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey and its scope cannot be extended, nor, on the other hand, can it be limited by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting—as he must—the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands

the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is, in any respect, incorrect in an action of ejectment."

This decision was also cited with approval in Knight *v.* The United Land Ass'n, *supra*.

In view of these decisions and the numerous adjudications of similar purport cited upon pages 6 and 7 of the brief of defendant in error already filed here, upon what theory can plaintiffs be permitted to show or prove anything with reference to the original grant for the purpose of affecting the specific description contained in the patent? That description excludes the land in question and it can only be included by holding that the patent survey embraced the disputed territory. But it does not embrace such territory and the very point heretofore adjudicated with monotonous regularity is that any error committed by the government in making the location, cannot be reached except by a governmental attack upon the patent.

Circuit Judge Sawyer, in Manning *v.* San Jacinto Tin Co., 9 Fed. Rep. 726, quoted the Teschemacher case *supra* with approval.

We specially request this court to peruse that part of the opinion in the Manning case which commences at page 729.

Assuming that this Court Has Power to Determine Whether the Patent Description Embraces the Land in Controversy, the Judgment Must be Affirmed Because the Inner Bay of San Pedro, Including Mormon Island, Has Never Been Patented to the Plaintiffs.

This subject is considered in the brief of defendant in error filed herein, point *b*, pages 21–25.

Justice McFarland in a dissenting opinion filed when the case was first determined in the Supreme Court of California, expresses the matter quite accurately, as follows: [Tr. p. 48.]

"In the case at bar plaintiff claims title under a patent for a tract of land known by the name of San Pedro. The patent recites a plat and survey made under the 13th section of said act of March 3, 1851, and contains full copies of such survey and plat, and it then conveys to the grantees 'the tract of land embraced and described in the foregoing survey.' There is no other description of the land granted. Now, the 'foregoing survey' does not include the land sued for in this case. Indeed, such land is expressly excluded and that certainly seems to me to end the case. How can a plaintiff in ejectment recover land which is not included in the title deeds on which he relies?"

It might be proper to remark that Justice Fox, who wrote the first opinion of the Supreme Court of California, was one of the attorneys for the losing party in the Knight case, *supra*, and he succeeded in getting the Supreme Court of California, in the first instance, to follow the error which it had committed in the Knight case. But in doing this, out of the seven judges who constituted that court, he only succeeded in obtaining the concurrence of Justices Sharpstein, Paterson and Thornton. When the rehearing was

granted Justices Fox and Thornton were not on the bench. Judge Sharpstein changed his mind and concurred with his associates in the opinion which Justice Field declares in the Knight case is the true doctrine.

The plaintiffs attempt to impress upon the court that the patent conveys the land described in the decree. This is true enough, but the survey defines and points out specifically the granted land, and there is no grant of any of the bay of San Pedro.

The grant is in the usual form and recites that the tract was surveyed in conformity to the boundaries specified in the confirmatory decree [Tr. p. 23], and that the parties are entitled to a patent "for the said "tract of land, the same being described as follows, to wit:" [Tr. p. 23, fol. 40.] Then follows a description, and at page 34, folio 60, we find the reservation. There is thus far no grant whatever. On pages 35-6 are the boundary lines to the tract excluded. Then at folio 65, below the word "map" we find for the first time the granting clause, which is, as already stated, a conveyance of "the tract of land embraced and described in the foregoing survey." The computation of the acreage shows what was granted, and then the description by lots at folio 64, leaves nothing open to inference.

The question is, not what the government should have granted, but what did the government grant?

There is no grant of any excepted land. The grant is of the land from which the exception has been made.

To hold that there has been a grant of the premises excepted, is to make a grant by judicial decree in defiance of the judgment of the officers chosen to perform that duty. The functions of the court do not include the making of grants.

Plaintiffs' Claim That the Patent in Question Includes Mormon Island, the Disputed Tract, Cannot be Investigated Here, Because it Does Not Present Any Federal Question. So, Also of the Claim Based Upon Alleged Prior Possession.

An inspection of the opinion of the Supreme Court of California [Tr. p. 53], shows that that tribunal determined that the entire inner bay of San Pedro, including Mormon island, is without the patent limits; and defendant contends that this decision cannot be re-examined here. The adjudications upon which reliance is placed in this connection can be found in the brief filed in this cause, pages 8, 20, 21.

In Los Angeles Farming & Milling Co. *v.* Hoff, 48 Fed. Rep. 344, a case decided by district, now circuit Judge Ross, in the southern district of California, a Mexican grant was considered, and it was there said:

"The issue as to whether or not the lands in controversy in this suit are embraced by the grant to De-Celis as defined in the patent, presents no federal question. It merely involves the location of boundary lines."

The case of Almonster *v.* Kenton, 9 How. 1, determined that state courts have a right to decide upon boundary issues and that this court has no authority to review such decisions, and that where the decision was that the true lines of the litigants did not conflict with each other, but the losing party alleged that her adversary's title was void because of an act of congress, this circumstance did not bring the case within the jurisdiction of the Supreme Court.

In Barbarie *v.* Mobile, 7 How. 451, it was decided that the question of boundary between adjacent owners cannot afford a subject for federal jurisdiction.

In Moreland *v.* Page, 20 How. 522, Justice Grier spoke for the court as follows:

"It is a mere question of boundary between two neighbors, both admitted to have valid grants from the United States. It is a question of fact, depending upon monuments to be found on the ground, documents in the land office, or the opinion of experts, or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States, should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involved the inheritance, partition, devise, or sale of it might, with equal propriety, be subject to the examination of this court in all time to come."

In the present instance it must be conceded that the patent to the Rancho San Pedro is valid, and the question as to what is or is not included within that patent description, presents nothing in the nature of a federal issue. The controversy as to whether the patent or decree controls might be said to have presented a dispute under a federal statute, but assuming, as we do, that the patent must control, then there is nothing to be adjudicated, except as to the construction of the calls in the patent description, and this branch of the case must be settled in accordance with general principles of law, as there are no special or peculiar regulations as to Mexican grant descriptions established either by law or usage.

In Roby *v.* Colehour, 146 U. S. 159, we find the following:

"Our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right so set up and claimed was

expressly denied, or that such was the necessary effect in law of the judgment."

In the case at bar, a right under the laws of the United States is set up and claimed with relation to the true location of the patent boundary. (I am not now referring to the question, as to whether the decree or patent should control, but only as to the construction of the patent description.)

Does the patent include, or does it exclude Mormon island? Such is the question, and the determination of this question involves nothing more and nothing less than an interpretation of the calls of the patent. Such interpretation does not depend upon any federal statute and no right is claimed as to such interpretation under any specially pleaded or other authority of the United States.

In Phillips *v.* Mound City Land & Water Association, 124 U. S. 605, it was held that although there was a controversy between the owners of a Mexican grant as to transactions had before Mexican tribunals, that nevertheless, there was a want of federal authority to review the matter; and the court approved Kennedy *v.* Hunt, 7 How. 593, in which case it was decided that the construction which had been given to a Spanish grant by a state court was not the subject of review.

California Powder Works *v.* Davis, 151 U. S. 339, involved a controversy between parties, each claiming under a Mexican grant, and the state court held against the validity of one of these grants, and this court decided that that determination presented on federal question.

The only possible federal question involved is as to whether the patent or decree of confirmation of the San Pedro grant should control; and

this being decided in the affirmative, the judgment must be affirmed, because where the federal questions involved were correctly decided by the state Supreme Court, the settled rule of this court is that the judgment must be affirmed without determining the other questions not of a federal character.

Myrick *v.* Thompson, 99 U. S. 291, and other cases cited on page 21 of defendants' brief.

If Plaintiffs are Correct in Their Assertion that the So-called Excepted Parcel Belongs to Them, Then the Government of the United States has Spent an Enormous Amount of Money in Deepening a Private Water-way Which Today Constitutes one of the Principal Harbors of California, and Where a Large Amount of Shipping is now Carried on.

While the record is not specific with relation to the uses to which the inner bay of San Pedro has been subjected, it may not be amiss to call the attention of the court to certain remarks contained in the first opinion delivered by the Supreme Court of California (subsequently overruled) wherein plaintiff's contention was sustained. Justice Fox, who rendered that decision, was the leading spirit in the adjudication which was reversed here, and to which we have already alluded, viz., Knight *v.* United Land Association, 142 U. S. 161. The conclusion reached by Judge Fox and those of his associates who concurred with him, was corrected by this court in the Knight case, but the latter decision was rendered too late to save the Supreme Court of California from falling into the

error, which Judge Field truly says was inconsistent with all previous adjudications of that court.

See concurring opinion of Justice Field, Knight *v.* United Land Association, *supra.*

Justice Fox makes this observation in the course of his opinion: "It was claimed by the counsel at the "argument, but we do not see that fact appears in the "record, that it (bay of San Pedro) is inaccessible to "sea-going ships, but at times of high water it is nav-"igable to small craft."

As a matter of fact there has been expended upon the bay of San Pedro, by the government, a very large amount of money.

The war department reported to congress in 1892, with reference to San Pedro harbor (which is called Wilmington harbor in the report) that previous to the commencement of the improvement, there was a depth of less than two feet at the entrance at low tide. Then follows a description of the work done, showing that the total amount appropriated was $955,000.00; and further stating that no additional appropriation was asked as it was desired to fully ascertain the effect of the operations then in progress.

See House Executive Document, Second Session Fifty-third Congress, vol. III; Report Secretary of War, vol. II, 1893: Engineers, part I, page 423, and appendix T. T. 3; also T. T. 4 of the same report; and vol. II, part IV, page 3229.

I also call the attention of the court to House Executive Document, No. 41, Fifty-second Congress, Second Session, which is a report of the secretary of war made to congress with reference to a deep water harbor at San Pedro or Santa Monica bay, California, pursuant to the provisions of the river and harbor bill, 27 Statutes at Large, page 95.

In that report the following appears: "The exist-
"ing harbor facilities for the accommodation of this
"traffic consists of Port Wilmington, the improved
"channel of which has a minimum depth of about
"fourteen feet at mean low water."

Further describing San Pedro, also called harbor of Wilmington, that report says: "The harbor of Wil-
"mington was originally one of the shallow lagoons
"separated from the ocean by a narrow line of sand
"beach, which have been mentioned as characteristic
"of the shore of San Pedro bay. In its unimproved
"condition, it was an estuary of about three miles in
"length, its navigable portion ending at Wilmington,
"and its lower part expanding into a shallow bay, sep-
"ated from the ocean by a bar, carrying a depth of
"about two feet at mean low water. * * * The
"improvement of this harbor by the general govern-
"ment has been in progress since 1871. * * * As
"the result of this improvement, there is now a navi-
"gable channel into Wilmington harbor, carrying a
"minimum depth of about fourteen feet at mean low
"water; and the formation of a depth of sixteen feet
"is anticipated from the continuance of the work. It
"is believed to be established that the natural forces
"will be able practically to maintain this artificial
"channel."

Harbor lines have been established around the exceptions referred to in the map, page 73.

See Report of Secretary of War, 1895, vol. II, part I, page 21, 473.

A most interesting document, and one containing the map showing the situation completely, can be found in the Report of the Secretary of War last referred to, vol. II, part V, page 3268, and is printed in Senate Executive Document No. 61, Fifty-third Congress,

Third Session. The map accompanying this document shows the inner harbor constituting the exception referred to in the patent, and the report recommends further improvement of the same. This recommendation resulted in the adoption of the project suggested by the war department. See river and harbor bill, 1896, page 14.

If there is any validity whatever to plaintiffs' contention, it is that all of the inner bay, which has been the subject of so much government expenditure, and within which hundred of ships unload every year, is their private property.

This very bay was the subject of elaborate discussion in the last congress. See views of minority of senate committee in congress, being H. R. 7977.

SUMMARY OF THE CASE.

Leaving out of view the question of jurisdiction, which has already been sufficiently discussed, the case (it is submitted) involves two questions, and two questions only, namely:

(*1.*) Is the land in controversy included in the patent?

(*2.*) If not so included, are plaintiffs entitled to recover it, either under the patent, or under their precedent title?

These questions with what is said about them by counsel for plaintiffs will be briefly considered; afterwards it will be shown, (*3*) that the other points made by the counsel are immaterial.

(1) Construction of the Patent.

It is admitted that Mormon island, the land in controversy, is included within the metes and bounds of the inner bay of San Pedro, as described and defined

in the excepting clause of the survey set out in the patent. [Fol. 60.]

The first question, therefore, resolves itself into this: Was it the intention of the land department to exclude the excepted tract from the land patented? If so, the intention must prevail, and the patent must be so construed.

Abstract of the Patent.

But a glance at the patent will be sufficient to show that the document admits of no other interpretation.

Its effect may be very briefly stated. It recites the filing of the claim, its confirmation by the board of land commissioners, the dismissal of appeal, and the filing of "a plat and certificate of the survey *of the "land confirmed as aforesaid*, authenticated on the 19th "day of Feb., 1858, by the signature of the surveyor-"general of public lands in California," and, in the granting clause there is granted to the confirmees "the "tract of land embraced and described in the foregoing "survey." [Fol. 64.]

In this certificate, which is set out at length, the surveyor-general, after referring to the confirmation, states that he had "caused the said tract to be sur-"veyed *in conformity to the boundaries specified in the "said confirmatory decree*;" that "the annexed map (is)a "true and accurate plat *of the said tract of land*, as "appears by the field notes of the survey thereof, etc. "under the direction of this office, which, having been "examined and approved, are now on file therein;" and that "under and by virtue of said confirmation and "survey, the said Manuel Dominguez *et al., are entitled "to a patent from the United States*, upon the presenta-"tion thereof, to the general land office, *for the said*

"*tract of land, the same being described as follows, to wit:*" [Fols. 37-40.]

Next follow field notes of a tract of land including the whole of the inner bay or harbor of San Pedro [Fols. 40-60], followed by the clause: "Excepting and "reserving and *excluding* from the tracts, as thus sur- "veyed, that portion thereof, covered by the navigable "waters of the inner bay of San Pedro, and which are "included within the following described lines, to wit:" (Here follow the metes and bounds of the inner bay as surveyed.) "Containing, exclusive of the lands "described as covered by the navigable waters of the "inner bay of San Pedro, 43,119.13 acres, and being "designated upon the plat of the public survey as lots "Nos. 37, 38 and 39, in T. 3 S. of R. 12 W., &c., * * * "and *lot No. 37, of T. 5 S. of R. 13 W., of the S. B. M.*" [Fols. 60-61.]

This is followed by the plat appearing on page 42, showing the lines of the exterior survey, and the lines of the excluded tract marked "inner bay of San Pedro." ["Exception."]

By reference to this plat, it will be seen that the only land granted in the vicinity of the harbor, is lot No. 37, from which "the inner bay of San Pedro" as platted, (marked on the plat by the word "exception") is excluded.

It appears also, from the table of courses and distances appearing on the plat, and especially from the note appended thereto, that the area of the confirmed tract, as determined by the survey, and as carried into the patent [Fol. 63], (43,119.13 acres), was arrived at by deducting from the area of the larger tract described (44,219.72 acres), the area of the "inner bay of San "Pedro" as surveyed (1100.59 acres).

Then follows the granting clause, by which there is

granted to the confirmees "*the tract of land embraced and* "*described in the foregoing survey*" [Fol. 64]; which obviously refers to the whole "*of the foregoing survey*," *i. e.*, to the whole of the description contained in the certificate including the excepting clause and not to a part of it, as is contended by the counsel for the plaintiffs.

Intention of the Patent.

The patent therefore, explicitly declares that the land *surveyed* and *granted* is the portion of the land first described that remains after taking away the land described in the excepting clause; and that this land *i. e.*, the land described in the exterior survey, *with the harbor excluded*, is a correct location of the confirmed grant as surveyed "*in conformity to the boundaries spec-* "*ified in the said confirmatory decree.*"

The intention of the patent is therefore manifest, and, as in the case of other documents, it must be construed according to this manifest intention. To reject the exception, and to construe the granting clause as referring only to the larger tract described in the survey, would be to alter the obvious effect of the patent, and also the obvious effect of the certificate of the surveyor-general; which, as we have said, can be construed only as certifying that the whole survey, including the excepting clause, is a true and accurate location of the land confirmed. The position of the counsel, that the granting clause "necessarily takes all "within the exterior boundaries of the survey" [pp. 5-6], including the navigable waters of the bay itself, is entirely at variance with the obvious intent of the document.

It must be admitted, therefore, that the land granted by the patent is the land described in the survey

therein set forth, and that the excepted tract is excluded from the survey. Hence it cannot be argued that the land in controversy, which is admittedly included in the excepted tract, is included in the survey. "As the patent conveyed by express reference to "the land described in the survey, the admission leaves "no room for this argument." [Valentine *v.* Sloss, 103 Cal. 219.]

In this connection, it is claimed by the counsel for the plaintiffs [p. 3], that "*the exterior boundaries of the "grant are fixed by the survey, and are identical with the "exterior boundaries fixed by the decree.*" And this proposition, if we use the term, "*exterior boundaries of "the grant,*" in its proper sense, is, indeed, true; for according to the survey, "the exterior boundaries of "the grant," as patented, must be regarded as following the lines of the inner bay of San Pedro, from course 0 to course 14, inclusive, and, therefore, as excluding the inner bay, marked "Exception," and this, as will be seen, is to be taken as the true location of the decree. But obviously, the term, ("*the exterior "boundaries of the grant*") is used by the counsel as referring exclusively to the exterior boundaries of the survey, and as thus including the excepted tract. And in this sense, his proposition is obviously untrue; for, according to the surveyor-general's certificate of survey, course 23 of these lines, after it strikes the northern line of the inner bay of San Pedro, is no longer an exterior boundary of the grant, but from this point to St. 25 of the exterior survey, the exterior boundaries of the grant are the lines of the inner bay of San Pedro, as surveyed.

Nor are the exterior boundaries of the survey to be taken as "*identical with the exterior boundaries fixed by "the decree.*" Some color is indeed, given to this con-

tention by the note on the plat cited by the counsel. [pp. 29–30.] But this was made by the deputy who made the survey, and its peculiar language was obviously overlooked by the surveyor-general. For, as we have seen, his certificate is explicidly to the effect that the survey, with the excepted tract excluded, conforms "to the boundaries specified in the said confirmatory "decree," and that "the annexed map is a true and "and accurate plat of the said tract of land;" and this certificate being the adjudication of an officer and department vested with the jurisdiction to decide, is to be taken as absolutely conclusive; and, of course, also as of superior dignity to a note on the plat.

Hence it is not conceded, as counsel seem to suppose, that "the exterior boundaries of the decree and "survey are identical" [p. 18]; or that "the exterior "boundaries of the grant are proved and conceded to "include Mormon island." [p. 8.] Nor do we concede, as is claimed by the counsel on page 30 of his brief, that "the reason for excluding the excepted part, is not "because it was not a part of the original grant of the "Rancho San Pedro, by Mexico to plaintiffs." On the contrary, we claim that it appears, from the certificate of the surveyor-general, that it was excluded for that very reason; for his certificate, as we have observed, cannot be otherwise construed than as declaring that the whole survey, including the excepting clause, is a correct location of the land confirmed, "in conformity "to the boundaries specified in said confirmatory "decree." [Fol. 39.]

This concludes the question, and it is therefore unnecessary for us to enter into an examination of it with a view of determining whether an error was committed. Whether the decision of the land department be erroneous or otherwise, it is conclusive. That

decision is embodied in the survey, and in this, and all cases, the form of patent universally observed is that of a grant "*of the land included in the survey.*" Hence, with regard to all patents, the sole material question is as to the construction of the survey; or, in other words, is the land included or excluded from the survey? [Valentine *v.* Sloss, 103 Cal. 219, cited *supra.*] We have, therefore, not thought it necessary hitherto, to discuss the construction of the decree. For whether that was rightly construed by the land department or not is altogether immaterial.

Construction of the Decree.

But to meet all the points of plaintiffs' counsel, it is now submitted that the construction given to the decree by the patent was correct, and that given to it by plaintiffs' counsel, altogether inadmissible.

The calls of the decree that are to be considered are the following:

"Thence, [from the point designated "some sand hills"], southerly to a point called *La Goleta*, on the sea coast; thence *following the sea coast easterly* to the river San Gabriel." [Fol. 34.]

To understand these calls it is to be observed, that "the point called *La Goleta*," is not on the shore of the main sea or ocean, but on the shore of the inner bay, and separated from the shore of the ocean by the channel of the bay, and its eastern shore. The channel at that point is eighteen chains or about a quarter of a mile wide [See survey fol. 47], and twenty-three feet deep.

These facts perhaps appear sufficiently from the plat in the record, but are more clearly shown and illustrated by the coast survey map entitled, "I No. 5, U. "S. Coast Survey, A. D. Bache, Superintendent. Recog-

"noizance of San Pedro Harbor, California. By the "Hydrographic Party under the command of Lieut. "Comd. James Alden, U. S. N. Assistant. Scale $\frac{1}{30,000}$ 1852;" of which it is submitted, the court will take judicial notice.

From this chart, which shows the conditions of the harbor in 1852, before any improvements were made, it appears that at low tide, there was a continuous sand bank uncovered by the water from the end of Rattlesnake island to a point near Dead Man's island, over a mile to the south of the Goleta, and that the entrance to the harbor is between the extremity of this bank and the point opposite.

At this entrance there is a bar, having a depth, at low tide, of three feet; but at a short distance to the north of this bar, the water deepens to six feet; and from there, all the way, along the channel, into, and to the head of the inner bay, is deep water.

The question is, therefore, presented as to where, at the period referred to, was the commencement of the inner bay? Was it at the outer end of the channel, *i. e.*, at the bar, or was it inner end of the channel, between station 2 and Rattlesnake island? In either case, "the point called *La Goleta*, on the sea coast," is on the shore of the inner bay, and separated from the shore of the ocean by the channel and its eastern shore; and, if the entrance be taken to be at the bar, it is over a mile along the channel from the open sea.

It will be seen, therefore, that the construction and location of the decree involved a very serious question. For, if the term "*easterly*" be construed as meaning "*east*," it is impossible to run such a line from the *Goleta, along "the sea coast,"* which from that point runs *westerly, northerly, eastwardly* and *westwardly* again, around the harbor, to the extremity of Rattlesnake

island, at station 25; which is separated from the Goleta by an arm of the sea a quarter of a mile wide and twenty-three feet deep, constituting the channel of the harbor.

Hence the question arose: Shall the call for "the "sea coast," or the call for *direction* prevail? If the latter had been taken as the controlling call, the boundary would have abandoned the "sea coast" and have crossed the channel of the harbor, thus including the harbor itself. On the other hand, regarding the "sea "coast"—which at that point is the shore of the inner bay—as the controlling call, the boundary would follow the exterior lines of the "inner bay," thus excluding the harbor. The latter was, in effect, precisely the construction given to the decree by the land department, as is evidenced by the passages from the patent we have cited.

It may be, indeed, that this conclusion was arrived at by a different course of reasoning than as above—as, *e. g.*, by construing the decree as necessarily implying the exclusion of the portion of the sea included in the exterior lines given, *i. e.*, the inner bay; which would have been a reasonable construction; but the conclusion in fact reached is the same, as above given, and the course of the reasoning by which it was reached is immaterial. The surveyor may, in fact, have arrived at it by following the sea coast around the harbor in a general easterly direction, as above indicated, or he may have simply construed the decree as implying that it was not intended to include any portion of the sea. In either case the result would be the same, namely, that the harbor was not included in the confirmed grant.

Nor can the peculiar form of the survey make any difference. In the patent the land confirmed and

conveyed is described as being the land remaining after deducting from the larger tract the smaller tract excepted; but—without altering the sense—it might have been described by terminating course 23 at the northern line of the bay, and then following the line of the inner bay to station 25 of the exterior survey, and thence to the mouth of the San Gabriel; or by following course 23 to the Goleta, and thence following the sea coast around the inner bay to station 25, and thence to the San Gabriel. In either case the effect would be precisely the same, and the bay would be excluded.

The last construction, it might be submitted, were it necessary to our case, is entirely correct. It is a cardinal rule that the calls of a survey are, if possible, to be reconciled, and this, in the present case, may be readily effected by construing the term, "*easterly*," as implying merely a general easterly direction. Thus construed, commencing at the *Goleta*, which is on the coast of the inner bay, and not on the ocean [*supra* p. 1], the boundary would follow the sea coast, *i. e.*, the coast of the inner bay, on which it starts, and thence along the shore of the ocean to San Gabriel river—the general course from the initial to the terminal point being easterly. This would exclude the portion of the sea referred to as "the inner bay of San Pedro," and must be presumed to have been the intention of the decree; for it cannot be presumed that it was the intention of the court to include in a private grant a harbor or port of such importance as the one in question; which, from the acquisition of California, has been used for commercial purposes, and has since been improved by the government at an expense of over a million dollars.

This location is, indeed, open to the apparent objec-

tion that the line thus indicated would, after leaving course 23 to the right, recross that course, thus making a somewhat unusual figure. But though the figure be awkward, its effect is simply to exclude the bay, precisely as was done by the surveyor-general; and it must be remembered that the court had no survey before it, but proceeded altogether upon verbal information, or such information as could be had from the loose and inaccurate Mexican title papers. It must therefore have been either unacquainted with the existence of the inner bay, or have supposed it to lie to the east of the course described as running from "some sand hills" "southerly to a point called La Gol-"eta on the sea coast." [Fol. 34.] It cannot be supposed that it knew that line would cross the bay. If it had known, and it was its intention that the lines to and from the *Goleta* should cross it, it would undoubtedly have referred to it.

In this connection it is necessary to call the attention of the court to a very important defect in the evidence of the plaintiffs.

To attack a patent for nonconformity to the decree of confirmation is, since the earlier decisions, altogether unprecedented. For it has long been settled law that, even where an error is committed, and appears on the face of the patent, the patent is nevertheless conclusive. Numerous decisions to this effect have been cited, and others will be referred to in the sequel. It is, therefore, clearly not competent for the plaintiffs to attack the patent; nor can they be heard to say that the patent does not conform to the decree.

But, assuming for the sake of the argument that the law were otherwise, the description in the decree of confirmation is taken from the Mexican title papers, and these papers—especially where there is a repug-

nancy in the decree as is the case here—must necessarily have a strong bearing on the construction of the decree, and should therefore, have been introduced. There is, as we have seen, a serious question of construction developed by the attempt to locate the calls of the decree, upon which the papers referred to would have cast a strong light; and the case, therefore, calls for the application of the rule, that where evidence is suppressed it is to be presumed adverse to the party whose duty it was to introduce it. And it is, therefore, to be presumed that the construction we have given to the decree—which is in effect the construction also given it by the land department—would have been confirmed by the missing papers.

Fortunately, however, it is not necessary in the present case to rely solely on this presumption; but there is enough in the record to show that the construction we have given to the decree is the true one. For it appears from the petition to the board of land commissioners, put in evidence by plaintiffs [See fol. 28 *et seq.*], that juridical possession of the rancho was given and the lines thus established are described. [Fols. 30 *et seq.*] This proceeding, it is well settled, has "all the force and efficacy of a judicial determination. It bound the former government and is equally "binding upon the officers of our government." [U. S. *v.* Pico, 5 Wall. 539.] It was therefore the duty of the court to conform to it, and it must be presumed, unless the contrary appears, that it did so. Hence, if the decree can, without violence, be construed so as to conform to it, it must be so construed.

Now, as we have shown the decree is susceptible of the construction we have given to it—that is to say, as requiring us to follow the sea shore from the Goleta around the harbor, thus excluding the harbor—and

we have submitted that this is in fact, the true construction of the decree, when we come to apply it to the ground; and we now add, that construed in this way, it conforms precisely to the boundary as established by the juridical possession, and that the construction contended for by the plaintiff would render it repugnant to that instrument.

Referring to the petition. [Fols. 30-1], it will be seen that, at the time of the juridical possession, there was included in the ranch a tract of land therein described which was afterward granted by the owners of the ranch to the Sepulvedas; and which is in fact the rancho known as the Palos Verdes, afterwards confirmed to the Sepulvedas. [See Hoffman's Reports Index, No. 446.] This is mentioned in order that the juridical possession may be understood. The relative locations of the two ranchos may be seen by a glance at the county map, or at the plat in the record.

In the juridical possession, one of the points in the boundary is the mouth of the river San Gabriel, on "*the coast*," from which the next course is "thence "along the said coast to a point opposite the salt pits "(la Salina.)" [Fol. 30.] The salt pit, or "la Salina," is at the western extremity of the ranch, and is shown on the plat and referred to in the survey. [Fol. 43.] The call "thence *along the said coast*," must be taken to refer to the coast of the bay—which is part of the sea —as well as to the shore of the ocean. The term "*coast*" applies generally to the shore of the ocean and to the shore of its bays or inlets; and where it is intended to distinguish the former from the latter, the term "ocean" or some other appropriate term as *e. g.*, "*high sea*," "*main sea*," "*outer sea*," is used.

Hence, the southern boundary thus described, *i. e.*, as running from the mouth of the San Gabriel along

the sea coast to the salt works—would follow the coast to station 25, and then around the inner bay to the point called la Goleta, and then, leaving the ranch as it now is, along the coast to the salt pits—thus excluding the harbor and thus also irresistibly confirming the construction we have given to the decree, which, as we have said, is also in effect precisely the construction given to it by the land department.

In this connection, it may perhaps be well to refer to the point made by counsel for plaintiffs on page 15 of his brief; which is that the waters of the bay are in fact not navigable. This is said on the authority of the first decision of the Supreme Court of California in this case, which was afterwards set aside on petition for rehearing. The court there says that there is no evidence in the record upon the point, but that it gathered from what was said by counsel, that the harbor is inaccessible to sea-going ships. But in this the court was mistaken; as it was also in overlooking the real channel of the harbor between the stations 24 and 25, and in supposing that the entrance was from the west, *i. e.*, the wide space on the map between station 24 and the northern side of the bay. In fact the inner bay is navigable for sea-going vessels, having a depth of from fourteen to twenty-one feet at the bar, according to the tide, and a greater depth on the inside; and even before it was improved by the government, was used by small vessels, and among others, by steamers and lighters for transhipping freight to the head of the bay. The shallowest water (at the bar) was three feet at low and about ten feet at high tide [See coast survey plat of date 1892, referred to *supra*, p. 2.]

It is, of course, not claimed by us that all the space included in the inner bay as surveyed and delineated

on the plat, is covered by water deep enough to be passed over by ships; but the term "navigable waters" is obviously used, in the patent, in its technical, common-law sense, as denoting the waters of a bay or inlet of the sea where the tide ebbs and flows; and—as its boundaries are precisely determined by the survey—the excepted tract is the tract "included within" the boundaries specified.

The Construction of the Decree by the Land Department Conclusive.

At all events, the question of construction and location involved was presented to the land department; and it was necessarily, in the exercise of the powers or jurisdiction conferred upon it, called upon to decide it; and its decision, which has been carried into the patent, is conclusive, and cannot be assailed in this action. [See authorities cited *infra*.]

Hence the position of the counsel for plaintiff that "the exception in this particular survey * * * is "repugnant to the judicial decree and to the main body "of the survey itself" [p. 6], is manifestly untenable.

With regard to the survey, it is sufficiently obvious that there is no repugnancy. The inner bay, as surveyed, is expressly excepted and excluded from the larger tract; and the evident meaning and intent of the whole survey taken together is precisely as though course 23 had terminated at the northern line of the bay and the line had then followed the exceptional survey from course 0 to course 14 inclusive. To reject the exception would be to alter entirely the obvious meaning of the survey.

So, also, with regard to the decree, as we have shown, the construction put upon it by the land department is, in fact, correct, and, at all events, is to be taken as

conclusive; hence, it cannot be claimed that there is any repugnancy.

Still less can it be said, as is claimed by the counsel [p. 10], that there are any *contradictions* in the patent. To say that the excepting clause of the survey contradicts the survey, is itself a contradiction in terms. Nor can it be said that a contradiction between the survey and the decree appears on the face of the patent; for the latter is not set out in the patent, nor, as we have seen, is it admissible in law for the purpose of showing a contradiction. Nor, in point of fact, as we have said, is there any repugnancy between them.

(2.) As to the Conclusive Effect of a Patent.

The other question involved is discussed, *supra*, pages 16 *et seq.*, and in the "brief of defendant in error," pages 5–7, where many of the authorities upon the subject will be found collected.

The question has been the subject of repeated consideration and decision by this court and by the Supreme Court of the state of California, for a period of over forty years, and for over thirty years it has been familiar law, with reference to Mexican land titles in California, that, after a survey has been approved and passed into a patent, it is, as against all collateral attack, "conclusive evidence * * * of the boundaries of the tract confirmed." [Gallagher *v.* Rilly, 49 Cal. 477]; and that "claimants under the grant cannot "be permitted, while the patent stands, to aver that the "claim comprised other or different lands from those "mentioned in the patent" [Carey *v.* Brown, 58 *id.* 185]; or, as otherwise expressed, "be heard to assert title to "any lands not included in the final survey." [Cassidy *v.* Carr, 48 Cal. 345.]

The principle is that the action of the land department, in the survey and location of a Mexican land grant is judicial in its nature and the approval of the survey, therefore, a judgment or judicial determination of the question of location and as such, conclusive of its correctness; that the patent is the record of such judgment and, therefore, not open to collateral attack [Beard *v.* Federy, 3 Wall 492; More *v.* Steinbach, 127 *id.* 83]; and hence, that "we are not at liberty to go "behind it."

San Diego *v.* Allison, 46 Cal. 168.

"The approval of the survey, by the proper officers, is the determination—the judgment of the appropriate department of government, that the survey does conform to such decree. That determination or judgment is not the subject of review by the judiciary. It is conclusive upon the courts in actions of ejectment as the adjudication of a competent tribunal, upon a subject within its exclusive jurisdiction. The patent which is the final document issued by the government is conclusive evidence of the validity of the original grant and of its recognition and confirmation and of the survey and its conformity with the confirmation * * * and cannot be attacked collaterally."

Moore *v.* Wilkinson, 13 Cal. 487.

The position of counsel for the plaintiff in error is stated on page 9 of his brief. It is, in effect, that the land department has no "jurisdiction to fix the bound-"aries to a Mexican grant nor had the surveyor-general "any such jurisdiction." But, obviously, in view of the authorities cited, this position cannot be maintained.

The authorities we have cited are but a few of almost innumerable decisions to the same effect. The same principle has also since been applied in cases of Mexican grants in other states and territories, as, for example, in Russell *v.* Maxwell Land Co., 158 U. S.

253, (cited by Mr. Chandler, on page 8 of his brief), and in Stoneroad *v.* Stoneroad, *id.* 240.

The law is very clearly expounded in the decision of the Supreme Court of California, now under review; and is fully sustained by the authorities there cited [91 Cal. 402]; nor is it true, as claimed by counsel for plaintiff in error [brief p. 29], that, "in all but one "(of the cases cited), the grants involved, were of spe- "cific quantities of land, lying in larger bodies." Moore *v.* Wilkinson, was of that kind, and in Teschemacher *v.* Thompson, it was assumed, for the sake of argument, that the grant was of the same character. But in both cases, this circumstance was immaterial, it having been claimed in the former case, that the land in controversy was outside the boundaries of the larger tract, and in the latter, that it was outside the the line of high water.

In all the other cases, the grants were of specific tracts, confirmed by metes and bounds.

Among the latter, is especially to be noted, the case of Chipley *v.* Farris, 45 Cal. 527, which, it will be observed, was in effect affirmed by the Supreme Court of the state of California, in United Land Association *v.* Knight, 85 Cal. 484, and distinguished from that case.

It is, however, directly in point to the case at bar, and deserves attention for the peculiar distinctness of the questions involved, and of the decision of the court thereupon.

In that case, an accurate survey of the boundaries of the grant as established by the juridical possession, was made by a competent surveyor, in advance of the decree of confirmation, and the metes and bounds of the survey were carried into the decree, which was set out at length in the patent; so that there could be

no kind of mistake or uncertainty about the precise location of the confirmed boundaries. But the surveyor-general (apparently for the purpose of making the boundaries of the grant conform to the system of public surveys), omitted from the western part of the grant, a triangular piece of land of some thousand acres in extent, and included some three or four thousand acres lying to the north of the north boundary as given by the decree of confirmation.

It was clear, therefore, (had the question been permissible), that the surveyor-general had deliberately, and, we may say, wantonly, departed from the boundaries given in the decree of confirmation; but it was nevertheless held that the patent "is a record which "binds both the government and the claimant, and "cannot be attacked by either party, except by direct "proceedings instituted for that purpose." [45 Cal. 538.]

This case is cited, not as necessary to establish the rule, which is too familiar to be questioned, but as illustrating the nature of its application.

This familiar and well established rule is not directly and expressly questioned by counsel for the plaintiffs in error, but it is indirectly attacked by the assumption of certain principles which seem to be regarded by the counsel as inconsistent with it; as, for instance, by the proposition on page 7 of his brief, that "the survey must conform to the decree;" that "the decree must be exactly observed" [page 8], that "the decree of confirmation of the Mexican grant is "the sovereign muniment of title" [page 10]; that "the "power or jurisdiction of the officers to do and act, is "always in issue when the acts of an officer are under "review;" that "the United States was bound by the "decree of confirmation and the stipulation that said

"decree was final;" and that "the decree and stipula-"tion is conclusive on the boundaries and on the gov-"ernment" [p. 18], etc.

All these propositions, properly construed, may, perhaps, be admitted; but they are not in any way inconsistent with the established rule; they were, in fact, urged upon the court in all the numerous decisions referred to, and were held to have no application.

It was no doubt the duty of the surveyor-general to conform his survey to the decree; but to enable him to do this, the power or jurisdiction of locating the calls of the decree was necessarily vested in him, and his decision with reference thereto, approved by department and carried into the patent, is final and conclusive. As observed by the court in the decision under review [page 402]: "It is true, the duty of that "officer was to locate the confirmed grant in conform-"ity with the decree; but it does not follow that when "the survey has been made, approved, and acted upon "by the land department, its correctness may be "impeached or disregarded in an action of ejectment; "and that, too, by one who claims under the very pro-"ceedings of which the survey was an essential part."

It is also to be observed that, in the case at bar, the decree of confirmation is not set out in the patent, as was the case in Chipley *v.* Farris, but is simply referred to as having been rendered [See transcript fol. 37]; which seems to bring the case directly within the rule laid down in Cruz *v.* Martinez, 53 Cal. 239.

In the United Land Association *v.* Knight, the fact that the decree of confirmation was set out in the patent, was regarded as a material circumstance, and on that ground, the decision in People *v.* San Francisco, 75 Cal. 388, was expressly distinguished. [pp. 476–486.]

In the passage last cited, it is said by the court that "both descriptions are upon the face of the patent;" and the court argued that it was a mere case of repugnancy between descriptions of equal dignity, and the same proposition is urged at length by counsel for plaintiff in error. [pp. 13–15.] But in this, under the unvarying decisions of this court, and the Supreme Court of California, the court, as we have seen, was mistaken; for, obviously, the location of the decree by survey and patent is a subsequent judicial proceeding, in which the former is merged; and this is true, indeed, with regard to all the precedent proceedings, including the grant and juridical possession; each of which is equally binding upon the officers of the government, but is merged in the subsequent judicial act. Thus, for example, the juridical possession is a judgment as to the boundaries of the grant, in the strictest sense of the term; and as such has always been held binding upon the courts. [U. S. *v.* Pico, 5 Wall. cited *supra*.] But it has never been held that, after judgment of confirmation, the decree of the court or the patent could be over-ridden by it.

Similarly, it is the duty of the surveyor-general, in the exercise of his power or jurisdiction, to conform to the decree of confirmation. But it has nowhere been held that the validity of the action of the surveyor-general could be disputed for error in the exercise of his jurisdiction; but the contrary has been uniformly affirmed. Hence, as we have seen, his survey, carried into the patent, cannot be questioned for nonconformity to the decree of confirmation, even where the latter is set out at length in the patent; and, *a fortiori*, the principle must apply to the case at bar; where the decree is not set out in the patent, and where the sur-

vey is sought to be impeached by matters *de hors* the patent.

Accordingly, whether the decree is set out in the patent or otherwise, no case can be found where the language of the patent will permit us to consider that the decree is of equal dignity with the survey. In all cases, it is set out or referred to simply for the purpose of showing the power under which the surveyor-general acts; and the language of all patents is, invariably, to the effect that the officers of the government, under the authority conferred upon them, surveyed the grant, as the law required, in conformity with the decree; that the survey set out in the patent is a correct location of the land; that the claimant is "entitled "to a patent" for the land surveyed, and that the land granted is "the land described in the foregoing sur- "vey."

The location thus certified, as we have seen, has uniformly been regarded by the courts, as the judicial determination of an officer or department, vested with full jurisdiction over the subject matter, and therefore, conclusive.

(3) Immaterial Points Made by Counsel for Plaintiffs.

In the above discussion, we have, we believe, touched upon all that is said by the counsel for plaintiffs that has any bearing upon the material questions involved. The other points made by him, it is submitted, have no bearing upon the case, and we refer to them simply for the purpose of removing a prolific source of confusion.

(*a*) Thus it is claimed by the counsel that "the "claims of plaintiffs and defendant to Mormon island "have a common root in the Mexican grant;" from

which he infers that the court may "look beyond the "patents to the original source of title,"—citing Henshaw *v.* Bissell, 18 How. 264, to that effect. [pp. 6–7.] But the principle laid down in that case applies only to conflicting patents of equal dignity, both including the land in controversy; and to assume that this is the case here is simply to beg the whole question involved; which is, whether the plaintiffs' patent includes the land in controversy. If it did, that would be the end of the case; and there would be no occasion to invoke the principle of law laid down in Henshaw *v.* Bissell. But our position is that the plaintiffs' patent does not include the land in controversy, and this position, it is submitted, has been fully established. Hence, the case cited can have no application.

(*b*) Again it is claimed that, in California, "the dis- "tinctions between law and equity have been abol- "ished," and that the supposed equities of the plaintiffs may be asserted in this action. [p. 16.]

That this is a mistaken view of the law of California has already been shown, but were it otherwise, the fact would make no difference. The plaintiffs' case discloses no equities which could be asserted even in an equitable action to set aside or reform the title. The questions raised by them are purely legal, and they therefore made no mistake in the form of their action; but their misfortune is that these questions have been again and again considered by the courts and determined adversely to them, and that their supposed equities consist merely in the claim that the plain meaning and intent of their patent should be disregarded so as to include land excluded from it.

(*c*) It is also urged that the court erred in finding that the defendant owned that land in controversy [pp. 17–18]; but the reason given for this contention is

the land is included in the decree of confirmation and hence, in the patent; which is but to renew the question of the construction of the patent already fully considered. Hence, the fact found—though true—if we are right in our contention that the land is not included in the patent, is altogether immaterial. For the plaintiffs must recover, if at all, on the strength of their own title; and whether the defendant has title is altogether immaterial.

(*d*) Of the same general character is the point [p. 27] that the "defendant * * * is an intruder "upon the estate of plaintiffs and as such, has no "status to contest with plaintiffs the strength or clear- "ness of plaintiffs' title." But this also manifestly begs the very question involved, which is whether the land is, in fact, included in their patent. If it were, the defendant would undoubtedly be an intruder. But if, as, we submit, has been fully shown, the land is not included in plaintiffs' patent, defendant is not an intruder, and whatever be his title, the judgment must be for him.

(*e*) Again it is urged that "the government is presumed to be honest;" from which it is argued, first, that the patent must be construed as claimed by the counsel; secondly, that defendant "can only retain the "land in the inner bay by tracing title thereto through "a Mexican grant."

The former conclusion relates exclusively to the question of the construction of the patent, which has already been fully considered.

With regard to the latter, the argument of the counsel is, in effect, that after the admission of California, the federal government had no title to the tide lands and its patent, therefore, could confer no title on the defendant; and hence, that defendant, if he had any

title, must in some way derive it from the Rancho San Pedro.

But for the sake of argument it may be admitted that the defendant has no title to the tide lands, if any, included in his patent from the United States, but only to lands above the line of high water; or, it might even be admitted that he has no title to any of the lands in controversy. For, in fact, whether he has title or not, as we have said, is altogether immaterial. He was in possession and plaintiffs could recover only by showing title in themselves which they have failed to do.

(*f*) Again, in the supplementary brief filed by counsel for plaintiffs, it is asserted that the plaintiffs had prior possession, and were therefore entitled to recover. But this claim is without any foundation in the record. On the contrary, it is expressly found that the defendant entered on land prior to Sept. 1, 1884, and that he *never ejected or ousted the plaintiffs.* [Fol. 9.] And it is also found "that the plaintiffs were never in "possession on that date or *at any other time.*" [Fol. 9. See also finding V, fol. 10.]

(*g*) Finally, the 7th section of the act of July 23, 1866, to quiet land titles in California is also invoked by the counsel to his assistance [Brief, p. 30]; though it is difficult to imagine in what way it can apply.

It does not appear that the land in controversy was in fact ever included in the San Pedro grant, nor does it appear that the owners of that ranch have ever "used, improved, or continued in the actual possession "of the same;" and it does appear that the owners have suffered over thirty years to elapse without attempting to avail themselves of the supposed privilege.

Sheehy *v.* True, 45 Cal. 236.

Nor, indeed, does it appear that the plaintiffs are

purchasers from the Mexican grantees or assigns. For by the petition [Fol. 29] and the patent [Fol. 64] it appears that the patentees deraigned title, most of them by inheritance from the original grantees, and some only by purchase; and by reference to the complaint [Fol. 1] it will be seen that the plaintiffs were among the former. Their claim, therefore, has no foundation in the record.

But were it otherwise, the fact would be immaterial in this case. The act of 1866 confers no title, but *a privilege to purchase only*. And it has never been held that a claimant under this act could recover in ejectment against any party in possession without title; or still less against a party holding the patent of the United States.

In the former case, his only remedy is to file his claim in the land department, and to procure his patent, and then to bring his suit; in the latter, his only remedy is suit in equity to have the patentee declared a trustee for his use.

Sheehy *v.* True, 45 Cal. 236, cited *supra*.

The case of Hayes *v.* Steiger, 156 U. S. 387, does not conflict with this principle. In that case, it will be seen by reference to the same case reported 76 Cal. 556, that the defendant who claimed under the 7th section of the act of 1866, had filed his claim and received his patent, and that the suit was brought by a pre-emption claimant of the same land, to have the defendant "charged as trustee of the patent procured by him."

Possibly the claim here made is the equity referred to by the counsel under point 5, page 16, and referred to by us *supra*, par. (*b*). If so, what has been said is sufficient to dispose of it.

Respectfully submitted,

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